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SCHOOL OF LAW

A TREATISE
ON THE
LAW OF LANDLORD
AND TENANT

INCLUDING
LEASES, THEIR EXECUTION, SURRENDER, AND RENEWAL,
THE PARTIES THERETO, AND THEIR RECIPROCAL
RIGHTS AND OBLIGATIONS, THE VARIOUS KINDS
OF TENANCY, THE USE AND POSSESSION OF
THE PREMISES THE CHARACTER OF
RENT AND THE REMEDIES FOR ITS
RECOVERY, THE TENANT'S RIGHT
TO FIXTURES, &c., &c.

WITH
FULL REFERENCES TO THE LATEST AMERICAN
AND ENGLISH CASES AND TO RELEVANT
AMERICAN AND ENGLISH STATUTES,
BOTH ANCIENT AND MODERN

BY
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IN TWO VOLUMES

VOL. I

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TO MY WIFE
MARGARET UNDERHILL,
THESE VOLUMES
ARE AFFECTIONATELY DEDICATED
BY THE AUTHOR

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Preface.

Owing to the fact that there already exist many text books treating more or less elaborately of the topic of the reciprocal relations and rights of landlord and tenant, it appears appropriate in this place for the author to state some of the reasons which in his opinion justify the publication of this work. This is the more necessary as it is reasonably certain that the plan, the theory and the merits of this work will be placed in comparison with the many treatises on the subject which are now in the hands of the profession. In the first place it has seemed to the writer that any treatment of the relation of landlord and tenant which lost sight of the fact that the relationship was of a contractual character, and that consequently the rules of the modern law regulating the subject of contract were applicable, must be at once insufficient and illogical. Keeping this fact in view constant reference has been made to the general principles of the law of contracts of which the rules regulating the relation of landlord and tenant are a part. For example, a full discussion is attempted of the rules of the construction and interpretation of covenants as contained in the instrument of lease. Again, such topics as consideration, description of the parties, subject matter, etc., have received adequate discussion; while, on the other hand, very many topics which anciently were regarded by the text-book writers as of great importance, but which have become obsolete, either by statutory enactment or by judicial legislation, have, in the interest of conciseness, been wholly or partly omitted. Thus there will be found very little in these volumes of the law of distress for rent for the reason that, in most States of the Union it has been abolished. On the other hand the landlord's lien for rent or advances which is altogether the creation

of statutory legislation is treated at considerable length. So, too, the feudal tenures and their incidents of various sorts receive but scanty space and attention, the space which their discussion would have occupied being employed in a discussion of more timely topics, as for example, the negligence of the landlord in general and the reciprocal rights and obligations of the parties to leases of separate flats or floors in dwelling houses.

The author has in general endeavored to adhere closely to the rules and principles of law which have been enunciated by the courts of last resort, preferring rather to record the law as he has found it to exist than to state what in his opinion the law ought to be. Where the courts have differed in determining the law, he has not, as a general rule, sought to reconcile the decisions, except to point out, when necessary, the differing circumstances under which the variant decisions were rendered. While the most recent cases, as being most accessible, have been given the preference in citation, the early American decisions and the English decisions, particularly those which are recognized as leading cases, have neither been overlooked, nor intentionally omitted.

An attempt has been made to have the citation of cases as complete and exhaustive as possible. Many thousand cases have been examined, analyzed and cited. It will be found in many instances that not only is the page in the report cited upon which the case cited begins, but that the page which contains or affirms the rule of law which the case is cited to support is also given. Where cases have been cited from the reports of the National Reporter system, the official reports have also been cited so far as the cases have been officially reported prior to going to press.

H. C. UNDERHILL.

Borough of Brooklyn, New York.

April, 1909.

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LANDLORD AND TENANT.

CHAPTER I.

THE PARTIES TO THE LEASE.

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§ 1. **The general rule.** As a general rule any person who has capacity to make a valid contract may enter into a lease either as landlord or tenant. This rule is subject to the exceptions which are recognized by the law of contracts. In the following sections we shall enumerate and examine certain particular classes of lessors and lessees, and determine so far as possible the extent of the power to contract so far as the power to contract is limited and defined by the particular facts of each case and the nature of the position occupied by the landlord or tenant.

§ 2. **Leases by life tenants.** A tenant of a life estate may convey all or any portion of his estate by deed or parol lease. If he conveys all his estate it is an assignment of it. If he grants a term for years it is a lease.¹ Any lease he may grant,

¹ *McC Campbell v. McC Campbell*, 5 Litt. (Ky.) 92; *King v. Sharp*, 6 Humph. (Tenn.) 55.

no matter for how long a term of years, is good only for the life of the lessor and terminates with his death. So, if a person has an estate for the life of another he may grant a lease for a term of years which will be good during the life of the *cestui que vie* but upon his death it is absolutely void even though the lessor in the meantime has acquired the reversion.² The executor or administrator of a life tenant cannot maintain an action for rent accruing after the death of the life tenant.³ A lease executed by a tenant for life, who was then under age, in which the reversioner is named, if not executed by him is void on the death of the tenant for life. An execution by the reversioner afterwards is not a confirmation of the lease so as to bind the lessee in an action brought on his covenant contained in it.⁴ Before the statute 11 George II, c. 19 the executor of a tenant for life who made a lease for years and died before the rent was payable, could not recover rent from the tenant for years. That statute provided that the executors of the tenant for life might recover a proportion of the rent down to the death of their testator. The statute, however did not destroy the right of the reversioner or the remainderman to enter upon the tenant for years for the latter had no more right than his lessor, and the estate of his lessor having terminated by his death the tenant for years was simply a tenant at sufferance. If the executor of the tenant for life held over the remainderman might either eject him or regard him as his tenant and recover for use and occupation. The remainderman has the same rights and remedy against a tenant for years, as against a life tenant holding over on the death of his lessor.⁵

§ 3. Leases by life tenants under a power. There is a marked and important distinction between a power to lease created by a will or a deed with a devise of the fee to another and a power to lease which is not expressly created in this manner but is merely the outcome of and an incident to the ownership of an estate for a limited period with a remainder or reversion in another. In the first case a lease for any term of years not exceeding the limitations placed upon the power in the in-

² Co. Litt. 476, 6 Co. 15a.

Watts, 7 Term Rep. 832, Esp. 501,

³ Steuber v. Huber, 107 App. Div.

4 R. R. 387.

599, 95 N. Y. Supp. 348.

⁵ Co. Litt. 50, 2 Black Com. 145;

⁴ Ludford v. Barber, 1 Term Rep.

Fevans v. Briscoe, 4 H. & J. (Mid.)

86, 1 R. R. 56; Doe d. Martin v.

139, 140.

strument will be valid and will be binding upon the owner of the reversion; while in the latter case the lease created by the owner of the limited estate will terminate with the expiration of the limited estate itself. Hence if an estate be granted to one for life with a power to grant leases for twenty years, his lease for twenty years will be valid and binding upon the remainderman though his own interest in the life estate may expire the next day. But if the life tenant is not invested with an express power to grant leases for years he can only grant leases which will be good during his life. Though he grant a lease expressly for a term it will not be binding upon the reversioner or remainderman after the death of the life tenant. A power to grant leases which shall be valid after the expiration of a life estate is of considerable value, both to the life tenant and to the remainderman or reversioner, for unless the life tenant possesses this power he cannot enjoy the use and profits of his estate to the best advantage. If he cannot give long leases it may happen that the premises will remain vacant, waste may occur, and the buildings be permitted to remain out of repair, owing to the fact that it is impossible to procure tenants who will accept a lease whose existence is dependant upon the uncertainty of the life of the life tenant. And on the other hand if the life tenant is permitted to give leases for a definite term of years which shall be binding on those who follow him in the ownership he will, by the receipt of a larger rent, be encouraged and enabled to keep the buildings in better repair, and to pay taxes and interest charges, so that in the end his power will not only operate to his own advantage but also to that of his successor. But while the power to grant a permanent lease extended beyond the estate owned by the lessor is to be favored if possible it will never arise by mere implication. It must be expressly conferred upon the life tenant or other persons owning the estate which is subordinate to the fee simple.

A power of a life tenant to make leases at his discretion which shall bind the remainderman after his death, must be strictly pursued. Equity will aid a defective execution of such a power where the circumstances of the case, and the interests of the lessee demand it. But while equity will aid the defective execution of a power to grant leases, it will

not interpose where there has been no execution of such a power for on general principles if the execution of the power in the life tenant is discretionary, it will leave it to his election freely to give or to refrain from giving a lease. If he has not executed it, equity will not do for him what he did not see fit to do for himself. The question of the execution by a life tenant of a power to lease, frequently arises between one who has entered under such a lease and the remainderman. If the lessee can show circumstances which ordinarily would warrant the interference of equity, he will be protected under his lease from the life tenant, though it may not have been executed in accordance with the express limitations of the power. Thus if the life tenant has given an agreement for a lease which was subsequently to be executed in proper form which has not been done, and the lessee had entered thereunder and had paid rent to the remainderman after the death of the life tenant the lessee will be protected in his possession of the premises upon the basis of an estoppel on the remainderman.⁶

§ 4. **The termination of terms created by a life tenant as a landlord.** At the common law upon the death of a life tenant who has made a lease for a term, the lease for the term is at an end irrespective of its length, unless the life tenant has power to lease for a term. The term is not revived as to the remainderman merely by the acceptance of rent by him.⁷ The lessee of a tenant for life upon the termination of the life estate of his lessor becomes a tenant at sufferance, of the owner of the fee. He may at once abandon possession as he is not bound to remain as the tenant of the reversioner with whom he has no relation or privity whatever. And if he promptly abandon the premises he will escape all liability for rent subsequently accruing whether to the personal representative of the life tenant or to the reversioner.⁸ The remainderman or

⁶ Howard v. Carpenter, 11 Md. 259, 283.

⁷ Doe v. Butcher, 1 Doug. 50; Jenkins v. Church, Cowper, 482; Mayhew's Case, 1 Coke, 147; Ludford v. Barber, 1 T. R. 86; Sykes v. Benton, 90 Ga. 402, 17 S. E. Rep. 1002; Noble v. Tyler, 61 Ohio

St. 432, 56 N. E. 199, 48 L. R. A. 735; Lowrey v. Reef, 1 Ind. App. 244, 27 N. E. Rep. 626; Miller v. Mainwaring, Cro. Car. 399; Jones v. Cowper, Willes, 169.

⁸ Hoagland v. Crum, 113 Ill. 365.

reversioner is not bound to give the lessee of the tenant for life a notice to quit upon the death of the tenant for life. The lessee of a tenant for life is presumed to know the limitations upon his landlord's title and the duration of his estate. If the subtenant shall remain in possession after the death of the tenant for life with the consent or acquiescence of the reversioner or remainderman, the latter may recover from him the reasonable value of the use and occupation of the premises for such period as he has been in possession.⁹ But he may be evicted by the reversioner after the expiration of the interest of the life tenant under whom he claims. He cannot maintain an action on the implied covenant for quiet enjoyment against the heirs of his landlord.¹⁰ The tenant of a life tenant has as against the remainderman or reversioner no rights which can be enforced at law.¹¹ There is no privity of estate or contract between the subtenant and the owner of the fee in remainder. For this and other reasons the subtenant cannot as against the remainderman remove his buildings or other fixtures on the termination of his lease by the death of the life tenant without the consent of the remainderman.¹² But the subtenant may on the death of his immediate lessor remove any crop which he may have sown during the term. This is the rule under the common law principle of emblements. And he may enter after the death of the life tenant for the purpose of removing the crop for a reasonable period after the expiration of his term.¹³ As to third persons who are not parties to the lease, the subtenant has no title which will enable him to secure damages for their acts in relation to the land. He cannot enjoin a third person from committing waste nor can he recover damages for waste or for trespass committed upon the property.¹⁴

⁹ Guthman v. Vallery, 51 Neb. 824, 71 N. W. Rep. 734.

¹⁰ Penfold v. Abbott, 32 L. J. Q. B. 67, 9 Jur. (N. S.) 517, 7 L. T. 384, 11 W. R. 169; Adams v. Gibney, 4 M. & P. 491, 6 Bing. 656, 8 L. J. (O. S.) C. P. 242, 31 R. R. 514.

¹¹ Carman v. Mosler, 105 Ia. 307 75 N. W. Rep. 323.

¹² Jones v. Shefflin, 45 W. Va. 729, 31 S. E. Rep. 975.

¹³ Carman v. Mosler, 105 Ia. 367, 75 N. W. Rep. 322; Guthman v. Vallery, 51 Neb. 824, 71 N. W. Rep. 734.

¹⁴ Johnson v. Grantham, 104 Ga. 558, 30 S. E. Rep. 781. In West Virginia a yearly term created by a lease executed by a life tenant runs to the end of the current

Though the lease of a life tenant for a term is on his death so far as the remainderman is concerned, absolutely void, it is competent for the subtenant by holding over with the consent of the remainderman to make a new lease. The relationship of landlord and tenant may, after the death of a life tenant, arise between his subtenant and the remainderman by the acts of the parties. Thus a lease by the widow of the deceased owner of real property, who had only a dower interest when she made the lease may be ratified by the heirs of the deceased on the death of the widow.¹⁵ The acceptance of rent by a remainderman and permitting the tenant to make improvements, are not an affirmance of the lease which is absolutely void at the death of the tenant for life.¹⁶

So a reversioner by accepting the rent from a subtenant after he comes into possession, does not thereby confirm a covenant for a perpetual renewal so as to make such covenant binding on him.¹⁷ Where a lease is determined by the expiration of the estate of the landlord who is a life tenant, and the lessee continues to hold under the remainderman, paying the same rent, the question whether a new lease has been made, is a question of fact. If the tenant continues to hold under the remainderman, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation in the old lease which is unknown to him, and which is not in accordance with the custom of the country.¹⁸ The fact that the remainderman received rent and sold the premises thereafter with a mention of the lease in the deed, and an exception of the lease in the covenant against encumbrances, and notice was taken of the lease in a subsequent mortgage, does not prevent the lease from expiring with the interest of the tenant for life.¹⁹ The remainderman

year in which the life tenant dies unless it is renewed by the remainderman accepting the subtenant as his tenant. *Holden v. Boring*, 52 W. Va. 37, 43 S. E. 86.

¹⁵ *Martens v. O'Connor*, 101 Wis. 118, 76 N. W. Rep. 774.

¹⁶ *James d. Aubrey v. Jenkins*, Bull. N. P. 96; *Doe d. Simpson v. Bitcher*, 1 Doug. 50; *Jenkins d.*

Yate v. Church, Cowp. 482; *Doe d. Jolliffe v. Sybourn*, 2 Esp. 667.

¹⁷ *Higgins v. Rosse*, 3 Bligh. 113.

¹⁸ *Oakley v. Monch*, 4 H. & C. 251, 35 L. J. Ex. 87; L. R. 1 Ex. 159, 12 Jur. (N. S.) 253, 14 L. T. 20, 14 W. R. 406.

¹⁹ *Doe d. Potter v. Archer*, 1 Bos. & P. 531. And see *Jordan v. Ward*, 1 H. Bl. 97, 2 R. R. 728.

who, on the death of the life tenant assents, either expressly or by necessary implication to the continued occupation of the premises by a subtenant who has taken a lease from the deceased life tenant creates a new tenancy which is either at will or from year to year as the case may be. Before the remainderman consents the subtenant is merely his tenant at sufferance. After a new lease is created by the consent of the remainderman he and the subtenant stand towards each other as landlord and tenant. There are then privity of contract and privity of estate between them and their relations are regulated by the terms of the new lease which has been made.²⁰ In leasing premises for a long term it is always advisable to protect the interests of the lessee where a life tenant has no power to grant leases for a term to have both the life tenant and the reversioner or remainderman unite in the execution of the lease. Of course where the remainderman or the reversioner unites with the life tenant in the execution of a lease as lessors the term does not come to an end with the death of the life tenant during the term. On the death of the life tenant the term continues and the lease at once becomes the lease of the remainderman or reversioner.²¹ The interest which the subtenant has in the term rises out of the successive estates of the lessors as each of them in turn becomes entitled to the ownership and possession of the property. So too, a remainderman or reversioner may by his conduct and declarations made during the life of the life tenant so estop himself that after the death of the life tenant he will be taken and regarded as the lessor of the subtenant.²²

§ 5. **The validity of leases by tenants for years.** A lessee of a term for years may make a lease as to a portion of his term which will make him a lessor. Broadly speaking if he carves out a term less in duration than his own term it is a lease, while if he parts with all his term it is an assignment. This is not always so, and in any case, whether a term created by a lessee

²⁰ Bacon's Abr. "Leases." O. 1; Pennington v. Tanier, 12 Q. B. 998; Tucker v. Morse, 1 C. & Ad. 365; Martin v. Watts, 2 T. R. 83; Crune v. Pridcaux, 10 East, 187; Collins v. Weller, 7 T. R. 478.

²¹ Lake Erie Gas Co. v. Petter-son, 184 Pa. St. 364, 39 Atl. Rep. 68.

²² Simpson v. Butcher, 1 Doug. 50.

shall be a sublease or an assignment, depends upon the intention of the parties to the instrument. The importance of determining whether an instrument is a sublease or an assignment arises from the fact that, if it is a sublease, the tenant for years has a reversion however small and may then pursue against his lessee all the remedies at law or in equity for non-payment of rent and other breaches of condition which a landlord may have against his tenant. And also as is elsewhere fully explained, it is sometimes very important and in fact absolutely essential to determine whether an instrument is an assignment or a sublease where the tenant for years is expressly forbidden to assign and sublet or either. If in the instrument transferring the term the termor reserves rent payable to himself, and a right to re-enter for a breach of condition, the writing, though conveying the whole interest of the termor, would be regarded in law as a sublease, and not as an assignment. Tenants from year to year and tenants for a fixed and certain period less than a year have usually the same power to grant lease less than their term as have tenants for years. Such leases are always subject to be determined by the expiration of the longer term out of which they are granted. From the peculiar nature of their tenancy tenants at will and tenants at sufferance are precluded from granting leases which will be of any effect or value as against their lessor. The tenant of a tenant at will is as to the original lessor merely a tenant at sufferance, whom the owner may oust as a trespasser, without notice to quit, for any alienation by a tenant at will of his term will terminate the estate at the election of his lessor.

§ 6. **Guardianship in general.** Several kinds or species of guardians are known to, and recognized by, the law, whose rights, powers and duties differ according to the class to which they belong. They are first, guardians by nature, as the father or mother of the infant; second by nurture; third, in socage; fourth, by will or deed; fifth, by appointment by a competent tribunal, usually a probate court; sixth, volunteer and *de facto*, as where a person enters upon an infant's land or interferes with his property without claim of right. In such case equity will consider him responsible *pro tanto* as a guardian. The father of an infant is its guardian by nature until it attains majority, and after his death, during the infant's minority its mother becomes

its guardian by nature,²³ until the infant arrives at the legal age when it may choose its own guardian. The right of the mother to act as the guardian by nature may be defeated by the will of the father of the infant. Where both the parents of an infant are deceased, the paternal grandfather is the guardian by nature.²⁴ Under the common law the natural guardian has jurisdiction and control only of the person of the infant,²⁵ and he cannot make a valid lease of the lands of his ward without an order of the court permitting and directing him to do so.²⁶ It has been intimated that perhaps a lease at will made by him would be good, in the absence of an express disaffirmance thereof by the infant when he attained his majority.²⁷ And where the mother, being only guardian by nature of several infants, enters into a lease for a long term of years which is joined in by her eldest child, he being then nineteen years of age, and the lessee builds upon the land and pays the rent for many years to the infants after they had attained their majority; and where upon all the circumstances the execution of the lease had been very beneficial to the infants themselves, a court of equity, on the application of the lessee, will not hesitate to establish and confirm the lease upon the ground that the infants had so acted that they were estopped to disaffirm it.²⁸

²³ *Capal's Heirs v. McMillan*, 8 Port. (Ala.) 197; *Fields v. Law*, 2 Root (Conn.) 320; *Jarrett v. State*, 5 Gill & J. (Md.) 27. The mother is the natural guardian of an illegitimate child and has a right to its control and custody. *Copeland v. State*, 60 Ind. 394; *Baker v. Winfrey*, 15 B. Mon. (Ky.) 504; *Friesner v. Symonds*, 46 N. J. Eq. 521, 20 Atl. Rep. 257.

²⁴ *In re Benton*, 92 Iowa, 262; 60 N. W. Rep. 614.

²⁵ *Nelson v. Goree's Adm'r*, 34 Ala. 565; *Capal's Heirs v. McMillan*, 8 Port. (Ala.) 197; *Kendall v. Miller*, 9 Cal. 591; *Kline v. Beebe*, 6 Conn. 494; *Indian Land & Trust Co. (Ind. Ter. 1904)*, 79 S. W. Rep. 134; *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 532; *Fonda v. Van Horne*, 15 Wend.

(N. Y.) 631, 30 Am. Dec. 77; *Rex v. Inhabitants*, 5 Mod. 221; *Rex v. Inhabitants*, 3 B. & Ad. 714.

²⁶ *Indian Land & Trust Co. (Ind. Terr. 1904)*, 79 S. W. Rep. 134; *May v. Calder*, 2 Mass. 55; *Anderson v. Darby*, 1 Nott & McCord (S. C.) 369; *Ross v. Cobb*, 9 Yerger (Tenn.) 363. In Texas a lease by a natural guardian is good but a lease of lands by the natural guardian of an infant expires upon the guardian's death when he is not the guardian of the infant's estate. *Maxwell v. Habon*, 22 Tex. Civ. App. 565, 55 S. W. Rep. 1124; *Hearne v. Lewis*, 78 Tex. 276, 14 S. W. Rep. 572; *Porter v. Sweeney*, 61 Tex. 213.

²⁷ *Pigot v. Garnish*, Cro. Eliz. 678, 734.

²⁸ *Smith v. Low*, 1 Atk. 489

§ 7. **The liability of an intruder as a guardian.** A stranger, who as a wrongdoer and without claim of right, intrudes upon the lands of an infant or interferes with his property and receives the rents and profits thereof may be treated by the infant as his guardian, by estoppel; and he will be held accountable, in equity, for the rent of the lands which he has received, or which he might have received by the exercise of ordinary diligence in renting them.²⁹ The infant may, after he has attained his majority, maintain a bill in equity for the purpose of an accounting for the rents, after he has recovered the land in ejectment. If the intruder continues in possession after the infant has become of age, equity will include this time in the accounting.³⁰

§ 8. **The power of a guardian in socage.** Guardianship in socage is a consequence and outcome of the descent of land held in socage tenure to an infant, and the guardianship devolves, by the common law, upon the next of kin to whom the inheritance cannot descend.³¹ This species of guardianship confers more than the control and custody of the person. The guardian in socage has absolute control of the lands until the heir attains the age of fourteen, and is entitled to the profits for the benefit of the heir. At the age of fourteen the infant may choose his own guardian, but if he fails to do so, the authority of the guardian in socage continues.³² A guardian by socage has absolutely no power or control over the personal property of the ward,³³ but he may lease the real property of the ward in his own name, and this lease will bind the ward to the same extent as though made in the name of the latter.³⁴ In modern times

²⁹ *Davis v. Harkness*, 6 Ill. 173, 41 Am. Dec. 184.

³⁰ *Drury v. Connor*, 1 Har. & G. (Md.) 220. See, also, *Goodhue v. Barnwell*, 1 Rice Ch. (S. C.) 198.

³¹ 2 Black. Comm. 88; Co. Litt. 87b.

³² *Byrne v. Van Hoesen*, 5 Johns. (N. Y.) 66; *Jackson v. De Wals*, 7 Johns. (N. Y.) 157; *Sylvester v. Ralston*, 31 Barb. (N. Y.) 386; *Rex v. Oakley*, 10 East, 494; *Rex v. Sherrington*, 3 B. & Ad. 714; *Rex v. Manners*, 3 Ad. & El. 597.

³³ *Foley v. Mutual Life In. Co.*, 138 N. Y. 333, 34 N. E. Rep. 211; 34 Am. St. 456, 20 L. R. A. 620 (affirming 64 Hun, 63, 18 N. Y. Supp. 615).

³⁴ *Byrne v. Van Hoesen*, 5 Johns. (N. Y.) 66; *Thacker v. Henderson*, 63 Barb. (N. Y.) 271; *Emerson v. Spicer*, 55 Barb. (N. Y.) 528; 38 How. Prac. 114 (affirmed in 46 N. Y. 594); *Gallagher v. David Stevenson Brewing Co.*, 13 Misc. Rep. 40, 34 N. Y. Supp. 94, 25 Civ. Proc. Rep. 106; *Wade v. Baker*, 1 Lord Raym. 130;

at least as will be subsequently explained, the father has full power to appoint a guardian by his will whose authority on the death of the father will supersede that of the guardian in socage. The father of an infant cannot, however, be his guardian by socage as such guardian must be a person who cannot inherit from the ward.³⁵ The authority of a guardian by socage to lease, and this is also true of all species of guardians, continues only during the minority of the ward. And, moreover, if the ward of a guardian by socage on attaining the age of fourteen years elect to enter upon his lands he may repudiate the lease so far as it has still to run.³⁶ The death of the ward terminates the lease, and so, also, does the death or removal of the guardian by socage.³⁷

§ 9. **The power of testamentary guardians.** In England by the statute 12 Car. 2, c 24, all tenures of land with a few exceptions were converted into tenures in socage, and, by the same statute, guardianship in chivalry with all its inconveniences and opportunities for injustice was abolished. It was also provided that the father of any minor, being under the age of twenty-one years and not married at the time of his death, might by a deed or will executed in the presence of at least two witnesses, appoint a guardian of such minor who would have the custody and tuition of the minor until he or she should have attained the age of twenty-one. By the same statute the guardian thus appointed was authorized to assume the complete custody and control of all the ward's property, both real and personal; and to manage the same for the use and benefit of the ward until he should have attained his majority, when the guardian must account to him for the property as well as for the rents and proceeds of the same. The testamentary guardian thus appointed had in law the same right to begin actions and take other proceedings for the infant as the guardian in socage might do. This statute also enabled the father, who could

Rex v. Oakley, 10 East, 491; Hill v. Saunders, 4 B. & C. 536.

³⁵ Graham v. Houghtaling, 30 N. J. L. 552. *Contra* by statute in New York, Holmes v. Seeley, 17 Wend. (N. Y.) 71.

³⁶ Osborn v. Carden, Plowd. 293;

Bedell v. Constable, Vaughn, 182; Wade v. Baker, 1 Lord Raym. 130; Rex v. Sutton, 3 Ad. & El. 597.

³⁷ Balder v. Blackburn, Browl. 79.

not be himself the guardian in socage to supersede such guardian by appointing a guardian for his child by an instrument properly executed. In England it has always been held that a guardian appointed by deed or will possesses the same power and authority as a guardian in socage, and that he may lease the lands of his ward, unless expressly restrained from doing so by the instrument by which he was appointed.³⁸

§ 10. **The power to lease of a guardian appointed by a court.** A guardian appointed by a court has usually under most of the modern statutes, the power to lease, though it may not be expressly conferred upon him by the statute authorizing the court to appoint him.³⁹ The possession of this power to lease is in most cases assumed to exist and indeed if not expressly conferred must be implied from the duty which in all the states is incumbent upon the guardian to secure the greatest possible profit or income from the real property of his ward and from his liability for rent in case he fails to use due diligence in doing so. The guardian, in leasing, may reserve the rents either to the ward or to himself and in either case the payment of the rent to the guardian and his receipt will release the lessee and be binding on the ward.⁴⁰ So also, a guardian has the power to enter into an agreement with another person permitting the latter to raise a crop on the land of the ward, and to keep two thirds of it, rendering to the infant the balance as rent.⁴¹ In the absence of a permissive statute the guardian has no power to sell land of the ward without recourse to a court of competent jurisdiction and obtaining its permission. Hence a guardian cannot lease land for the purpose of developing it by drilling oil wells as the oil, being a part of the land itself is also a part of the *corpus* of the estate of the ward over which the guardian has no control.⁴²

³⁸ *Bedell v. Constable, Vaughn*, 179; *Parry v. Hodgson*, 2 Wils. 129; *Shaw v. Shaw, Vern. & Scriv.* 606. The rule would doubtless be the same in this country. *Thacker v. Henderson*, 63 Barb. (N. Y.) 271.

³⁹ *Huff v. Walker*, 1 Ind. 193; *Magruder v. Peter*, 4 Gill & J.

(Md.) 323; *Richardson v. Richardson*, 49 Mo. 29; *Tracker v. Henderson*, 63 Barb. (N. Y.) 271.

⁴⁰ *Ross v. Gill*, 1 Wash. (Va.) 7.

⁴¹ *Weldon v. Lytle*, 53 Mich. 1, 18 N. W. Rep. 533.

⁴² *Stoughton's Appeal*, 88 Pa. St. 198.

§ 11. When the permission of the court to the making of the lease is required. In all cases it is advisable, and in most cases absolutely necessary, to obtain the approval of a court of competent jurisdiction to the action of the guardian before he can execute a lease of the land of his ward.⁴³ If a statute provides that the guardian may act under the direction of the court,⁴⁴ or if it clearly requires that he shall apply to the court to sanction his actions in the management of the estate of the ward,⁴⁵ a lease executed without the sanction and approval of the court may be rescinded by the lessee or by the ward.⁴⁶ So, too, in England, a guardian appointed by the chancellor being, as it were, in the position of a receiver, cannot execute a valid lease without the prior permission of the court of chancery.⁴⁷ A court of equity on an application by a guardian for leave to execute a lease of land belonging to infants, will order the execution if the best interests of the infant owners seem to require it. Thus, permission was given to lease property for a term of ninety-nine years, where the lessee was to improve the property at his own expense, with a provision for a readjustment of the rent every twenty years, where it appeared that an increase in the rent would result only if betterments were made upon the land. These improvements would of course have to be made by the owners, if the lease were not executed, and the circumstances that some of the infant owners were females, and that this arrangement would give them a fixed income whereas before this the land had been unproductive call loudly to a court of equity to give the relief demanded.⁴⁸

§ 12. Limitations upon the power of a guardian to lease. The power of the guardian to lease will not enable him to make a valid lease of the land of his ward for a longer period than

⁴³ Field v. Harrick, 5 Ill. App. 54 (affirmed in 101 Ill. 110).

⁴⁴ Bates v. Dunham, 58 Iowa, 308 12 N. W. Rep. 309.

⁴⁵ Huff v. Walker, 1 Ind. 193.

⁴⁶ Haskell v. Sutton, 53 W. Va. 206, 216, 44 S. E. Rep. 553; Field v. Herrick, 5 Ill. App. 54 (affirmed in 101 Ill. 110). *Contra*, in Palmer v. Cheseboro, 55 Conn. 114, 10 Atl. Rep. 508, where the statute, which

was construed, provided that conservators "shall have the charge of" and "shall manage" the estates of their wards and the court held that they might lease the real property of their wards without the approval of the court.

⁴⁷ Rex v. Sutton, 3 Ad. & El. 597.

⁴⁸ Ricardi v. Gaboury, 115 Tenn. 484, 89 S. W. Rep. 98.

the majority of the ward. But a lease by a guardian for a term extending beyond the term of his guardianship is not void on the ward becoming of age, but is voidable only. Such lease may therefore be confirmed by the ward by parol, or by any act equivalent to an affirmance, such as the receipt of rent by the ward after he is of age.⁴⁹ So, a lease by a guardian of an infant under the age of fourteen, for a term of years extending beyond the arrival of the infant at that age may be avoided by another guardian chosen by the infant when he attains that age.⁵⁰

§ 13. **The duty of the guardian to lease.** A guardian of an infant owning real property has the duty incumbent upon him to lease the same for the best rent that can be procured and if he shall fail to do so he is liable personally for the rent which he might have obtained.⁵¹ In some states it is provided by statute that the guardian cannot himself occupy the lands of his ward, but that he must lease them under the direction of the court.⁵² But the rule is otherwise at common law.⁵³ A guardian who is a cotenant of land with his ward is liable to him for rent,

⁴⁹ *Field v. Herrick*, 108 Ill. 110 114; *Van Doren v. Everitt*, 5 N. J. Law, 528; *Ross v. Gill*, 4 Call. (Va.) 250; *Bacon v. Taylor*, Kirby (Conn.) 398; *Jackson v. O'Rorke* (Neb. 1904), 98 N. W. Rep. 1068; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; *Putnam v. Ritchie*, 6 Paige Ch. (N. Y.) 390; *Smith v. Low*, 1 Atk. 489; *Overbach v. Heermance*, Hopk. Ch. (N. Y.) 337; *Kitchen v. Lee*, 11 Paige Ch. (N. Y.) 107.

⁵⁰ *Snook v. Sutton*, 10 N. J. Law, 133.

⁵¹ *Clark v. Burnside*, 15 Ill. 62; *Griffin v. Collins* (Ga. 1908), 53 S. E. Rep. 1004; *Mudd's Ex'rs v. Reed*, 11 Ky. Law Rep. 998; *Drury v. Connor*, 1 Har. & G. (Md.) 220; *Shurtleff v. Rile*, 140 Mass. 213, 4 N. E. Rep. 407; *Smith v. Gummere*, 39 N. J. Eq. 17; *In re Kopp*, 2 N. Y. Supp. 495, 15 Civ. Pro. Rep. 282; *In re Laney's Es-*

tate, 14 Pa. Co. St. Rep. 4, 2 Pa. Dist. Rep. 800; *Hughes' Appeal*, 53 Pa. St. 500; *Harvin v. Riggs*, 1 Rich. Eq. Cases (S. C.) 287; *Harley v. Deewitt*, 2 Hill Eq. (S. C.) 367; *Peale's Adm'r v. Thurman*, 77 Va. 753.

⁵² *Muller v. Brumer*, 69 Ill. 108.

⁵³ In Louisiana a father and the natural tutor or guardian of his minor child who has for several years cultivated land which was the common property of himself and the minor child, will be charged with the yearly rent of a one undivided half which was owned by the child, together with legal interest thereon. The infant cannot be charged with the losses of the cultivation as the relationship between the father and child in the land is that of landlord and tenant and it cannot be said that they cultivated it jointly. *Succession of Trosclair*, 34 La. Ann. 326.

though he may not have used more than his own portion of the land, as it is his duty as guardian to see to it that the land of his ward is made productive.⁵⁴ He is only the agent or bailiff of the ward, and if he occupy the land of the ward, he becomes thereby the tenant of his ward and he is responsible for the reasonable value of the use and occupation of the land, less the reasonable value of the improvements, if any, made by him.⁵⁵ If the guardian does not himself occupy the ward's land he is not liable for an error in judgment in leasing it for a lower rent than could have been obtained by further inquiry where he has acted in manifest good faith and has obtained the approval of the court.⁵⁶

§ 14. **The guardian's duty to collect rents.** The guardian may sue in *his own* name and usually without joining the ward as a party, for rent which accrues under a lease made by him. He must employ due diligence in collecting the rents promptly as they accrue. If it appears that he did not use proper efforts to collect the rent, the ward can hold him liable for the reasonable rental value of the land.⁵⁷ Where a guardian allows the administrator of the estate in which his ward has an interest, to take charge of the real property of his ward, he is liable for the rents up to the time the land was sold to pay decedent's debts.⁵⁸

§ 15. **Formal requisites of the lease.** The lease of a guardian is valid and will bind the ward though it be made in the name of the guardian individually and delivered as his individual deed.⁵⁹ It is always advisable that a lease of a guardian shall be in writing but this is by no means indispensable where the statute of frauds does not apply; though, if by statute, a guardian's lease must be in writing, an oral lease is absolutely void.⁶⁰ A

⁵⁴ *Harvey v. Dewitt*, 2 Hill Eq. (S. Car.) 367.

⁵⁵ *Taylor v Calvert*, 138 Ind. 67, 37 N. E. Rep. 531; *In re Kopp*, 2 N. Y. Supp. 495, 15 Civ. Pro. Rep. 282; see, also, *Royston v. Royston*, 29 Ga. 82, as to the guardian's liability for the improved rent.

⁵⁶ *McElheny v. Musick*, 63 Ill. 328.

⁵⁷ *Mudd's Ex'rs v. Reed*, 11 Ky. Law Rep. 998.

⁵⁸ *Coggins v. Flythe*, 113 N. C. 102, 18 S. E. Rep. 96, and to the same effect *Appeal of Wills*, 22 Pa. St. 325.

⁵⁹ *Whyler v. Van Tiger* (Cal. 1887), 14 Pac. Rep. 846; *Field v. Schiefflin*, 7 John. Ch. (N. Y.) 150, 11 Am. Dec. 441.

⁶⁰ *Sawyers v. Zachery*, 1 Head (Tenn.) 21. A guardian's stipulation in his lease to pay for improvements on the land does not

person who in giving a lease, describes himself as guardian of another will be held personally liable thereon unless something appears in the contract clearly showing a contrary intent even though the execution of the lease may have been approved by the court.⁶¹

§ 16. **Covenants by guardians.** A guardian cannot covenant so as to bind the property of his ward. Hence if, in executing a lease, a guardian, or other person standing in the position of a trustee, enter into general covenants such as a covenant for quiet enjoyment, he fails to bind the beneficiary or the estate which he represents. The guardian is, however, bound personally by such covenants and as to him they stand upon the same footing as though the lease had been made by the guardian or other *quasi* trustee in his individual right.⁶² A covenant in a lease made by a guardian to renew it at the end of the term, is not binding where by statute the consent of the court is required to a lease executed by a guardian.⁶³

§ 17. **An infant's liability for rent.** The general rule of law is that an infant can bind himself or his estate for necessities. This is so, however, only where he is living apart from his father, and where he is laboring, receiving the profits of his own labor and appropriating them to his own use. In all such cases as the parent whose duty it is to support the infant, is not receiving any of the fruits of the infant's industry, the latter will be liable either on his express promise, or the law will imply a promise on the part of the infant to pay for necessities which have been furnished him.⁶⁴ In applying the rule the principal difficulty is to determine what, in the particular case, are necessities. Though we are without any direct adjudication upon this question in its relation to the occupancy of real property by an infant, inasmuch as shelter from the extremes of temperature, and protection from the vicissitudes of the weather, are

bind the ward. *Barrett v. Cocks*, 12 Heisk. (Tenn.) 566.

⁶¹ *Nichols v. Sargent*, 125 Ill. 309, 17 N. E. Rep. 475, 8 Am. St. Rep. 378.

⁶² *Craddock v. Stewart*, 6 Ala. 77; *Chestnut v. Tyson* 105 Ala. 149, 16 So. Rep. 723; *Bloom v.*

Wolfe, 50 Iowa, 286; *Sumner v. Williams*, 8 Mass. 163; *Whitney v. Dewey*, 15 Pick. (Mass.) 428.

⁶³ *Globe Soap Co. v. Louisville & N. Ry.*, 27 Ohio C. C. 759.

⁶⁴ *Green v. Wilding*, 59 Iowa, 679, 13 N. W. Rep. 764, 44 Am. Rep. 696.

prime necessities of human existence without which human life is neither safe nor tolerable, it would seem that the infant would be liable for the rent of premises which he had occupied as a dwelling, whether upon an express contract to pay rent for them or for their reasonable value. The rule is that what are necessities for which an infant would be liable is a question for the jury depending on all the circumstances of the case.⁶⁵ The principal facts by which they ought to be guided in their inquiry are whether the articles were suitable to the infant's estate and condition and whether he was without the means of supply.⁶⁶ Thus under this rule the jury may consider, in determining the liability of the infant for rent, the size, character and location of the premises in question in comparison with his parent's abode, and his own financial condition and usual manner of living, the size of his family if he have a family, and whether or not his parent or guardian is willing and of means sufficient to provide a dwelling place for him. So, too, inasmuch as the husband, though an infant, is liable for necessities furnished his wife, he would doubtless be liable for rent or for the use and occupation of premises occupied by her as a dwelling, under such circumstances as would render him liable if he were an adult.⁶⁷ But on the other hand, inasmuch as articles purchased by an infant to be used in or to enable him to carry on business are not in law necessities, he would not be liable for the rent or for the use and occupation of premises occupied by him solely for business purposes.⁶⁸

⁶⁵ *Stanton v. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255; *Swift v. Bennett*, 10 Cush. (Mass.) 436.

⁶⁶ *Davis v. Caldwell*, 12 Cush. (Mass.) 512.

⁶⁷ As to the liability of an infant for his wife's necessities see *Cantine v. Phillips' Administrator*, 5 Har. (Del.) 428; *Price v. Sanders*, 60 Ind. 310; *Cole v. Seely*, 25 Vt. 220.

⁶⁸ The authorities are not altogether harmonious upon the question whether the jurisdiction to determine what articles are nec-

essaries belongs to the court or to the jury. Many cases hold that whether articles of a certain class or kind are such as infants would be liable for, or whether certain kinds of expenditures are necessities, must be determined by the court; but whether a particular class is suitable to the condition and estate of the infant is for the jury. *McKanna v. Merry*, 61 Ill. 177; *Garr v. Haskett*, 86 Ind. 373; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Henderson v. Fox*, 5 Ind. 489.

§ 18. **The ratification of a lease made by an infant.** According to the general rules relating to the making of contracts by infants, a lease executed by an infant is not void but is voidable at the election of the infant on his becoming of age. The lessee of the infant cannot set up the infancy of his lessor to invalidate the lease or to exempt him from the payment of rent.⁶⁹ The infant has a reasonable time after his attaining his majority, in which he may elect whether to ratify or to repudiate his lease.⁷⁰ The ratification cannot be implied. A direct promise to pay rent or an express agreement to ratify the lease is essential. There must be an express confirmation or a new promise, voluntarily and deliberately made, with a knowledge that there is no existing legal liability on the lease.⁷¹ Subject to these limitations and qualifications, an infant who, on reaching his majority, retains land leased to him during his infancy ratifies the lease.⁷² It is not necessary in order to effect a disaffirmance by an infant lessee that he shall place the lessor *in statu quo*. The infant is not bound to pay or to tender back the benefit or advantage which he has received under the lease.⁷³ This general rule has not been repealed by a statute which provides that the marriage of any female infant to an adult shall be a discharge of her guardian and that the guardian shall thereupon render his account to the ward. The statute does not release the married woman from the disability of infancy and she may still disaffirm her lease,⁷⁴ when she subsequently attains her majority.

§ 19. **The validity of a lease at will made by a feme sole.** A *feme sole* may at the common law execute a valid lease of her lands. The marriage of a *feme sole* does not of itself determine a lease at will made by her as lessor before her marriage, though her husband has the right thereafter to put an end to it. The reason of this is the consideration which the common law has for the rights of the husband for it might be that the lease at

⁶⁹ Field v. Herrick, 108 Ill. 110, 114; Porch v. Fries, 18 N. J. Eq. 204, 209.

⁷⁰ Green v. Wilding, 59 Iowa, 679, 13 N. W. Rep. 761, 44 Am. Rep. 696.

⁷¹ Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574.

⁷² Baxter v. Bush, 29 Vt. 465; Robson v. Flight, 4 De G. J. & S. 608, 34 L. J. Ch. 226, 11 Jur. N. S. 147, 11 L. T. 725, 13 W. R. 393.

⁷³ Shipley v. Smith, 162 Ind. 526, 72 N. E. Rep. 803, 804.

⁷⁴ Shipley v. Smith, 162 Ind. 526, 72 N. E. Rep. 803, 804.

will would be for the benefit of the husband when he assumed the ownership of the chattels of the wife. Hence the lease at will of the woman did not determine except by some express declaration or act on the part of the husband evincing his intention that it should come to an end.⁷⁵ So also, where a *feme sole* as lessee takes a lease at will, her subsequent marriage is not a determination of the will for though, by the marriage, she at the common law came under the will of her husband the law required some express act on his part before the lease at will was determined.⁷⁶

§ 20. **The effect of her marriage upon a lease made by a feme sole.** By the common law as we have seen, the husband upon the marriage became entitled absolutely to all the personal property of the wife in possession, as well as to the rents and profits of the real estate owned by her. If she were possessed as lessee of a term of years it became his property during her life. He could sell, forfeit, surrender or otherwise dispose of the term during coverture without her consent,⁷⁷ and, if he survived the wife the lease became to all intents and purposes his own by marital right,⁷⁸ without the necessity of his taking out administration upon his wife's estate.⁷⁹ During the life of the wife, the interest of the husband in a lease for years in which she was lessee was liable under an execution against him.⁸⁰ If, however, the husband made no disposition of the lease during his life, on his death it went absolutely to his wife if she survived him;⁸¹ nor could he dispose of the lease by his will because the *jus disponendi* exists and can operate only during the life of the husband.⁸² A woman being possessed as lessee of a term

⁷⁵ Henstead's Case, 5 Coke, 10; Forse & Hembling's Case, 4 Coke, 64a; Co. Litt. 55b.

⁷⁶ Blunden v. Baugh, Cro. Car. 304; Henstead's Case, 5 Coke, 10; Co. Litt. 55.

⁷⁷ Meriwether v. Booker, 5 Litt. (Ky.) 256.

⁷⁸ 2 Black. Comm. 432, 433; Yonge v. Radford, Hob. 3; Ellsworth v. Hines, 5 Wis. 613; Daniels v. Richardson, 22 Pick (Mass.) 565.

⁷⁹ Doe d. Roberts v. Polgrean, 1 H. Black. 535; In re Bellamy, Elder v. Pearson, 53 L. J. Ch. 174, 25 Ch. D. 620, 49 L. T. 708, 32 W. R. 358.

⁸⁰ Bacon, Abr. "Baron & Feme" C.; Co. Litt. 46, 351.

⁸¹ Co. Litt. 351; Druce v. Dennison, 6 Ves. 394; Moody v. Mathews, 7 Ves. 183; Wildman v. Wildman, 9 Ves. Jr. 177, 7 R. R. 153.

⁸² Bracebridge v. Cook, Plowd. 418; Co. Litt. 300a, b; 351b; Cro. Car. 344.

for years on marrying an alien the marriage is not a gift in law of her interest in the term.⁸³ If a woman who is a lessee for years marries, the act of the husband thereafter in taking a new lease for both their lives is in law a surrender of the lease and binding on the wife.⁸⁴

§ 21. The invalidity of a lease made by feme covert at the common law. A lease executed by a *feme covert* of her own lands during coverture is by the common law, absolutely void, from the execution, and cannot be enforced.⁸⁵ In equity however the rule is different for in that jurisdiction a married woman upon whom a power to lease lands has been expressly conferred by will or deed may execute such power without the concurrence of the husband provided, however, that from the instrument conferring the power to lease it is clear that the donor of the power intended to exclude the disability of coverture.⁸⁶ But at the common law the husband is entitled to the receipt and use of the rents and profits of the wife's lands and she cannot by any action on her part which will be binding upon him, divest him of them.⁸⁷ And it has also been held that in equity the husband acquires at once upon his entering into an engagement to marry an inchoate right to the rents. A contract by the woman with whom he has contracted to marry executed between the engagement and the marriage by which, without his consent and knowledge she parts with her real property is in equity a fraud upon his rights. The chancellor will set such a contract aside although it would be binding at common law.⁸⁸ For it is well settled in equity that the concealment from the husband of the execution of a deed conveying her property

⁸³ *Theobalds v. Duffoy*, 9 Mod. 102, 104, and the wife may sue and be sued thereon as a *feme sole* notwithstanding her marriage to the alien.

⁸⁴ 2 Roll. Abr. 495.

⁸⁵ *Snyder v. Webb*, 3 Cal. 83; *Keller v. Klopfer*, 3 Colo. 132; *Ela v. Card*, 2 N. H. 175; *Murray v. Emmons*, 19 N. H. 483; *De Wolf v. Martin*, 12 R. I. 533; see, also, *Manby v. Scott*, 1 Mod. 124, 127; *Jennings v. Bragg*, Cro. Eliz. 447;

Lord St. John v. Lady St. John, 11 Ves. Jr. 526, 531; 1 Black. Comm. 444.

⁸⁶ *Hearle v. Greenbank*, 3 Atk. 695.

⁸⁷ *Den v. Quimby*, 3 N. J. Law. 985; *Baynton v. Finnall*, 12 Miss. 193; *Clarke's Appeal*, 79 Pa. St. 376.

⁸⁸ *Logan v. Simmons*, 3 Ired. Eq. (N. C.) 487, 494; *McAfee v. Ferguson*, 9 B. Mon. Ky. 475; *Crane v. Morris*, 6 Peters (U. S.) 598.

prior to her marriage by which his rights will be defeated is presumptive fraud, and will be sufficient to convince any equity on his application.⁸⁹ The marriage of a single woman who is a lessee under a lease executed prior to her marriage renders her husband liable to all the covenants of her lease.⁹⁰ He is thereby responsible for all the rent in arrears at the date of the marriage and for all the rent which may subsequently become due during the coverture. He will be liable for the rent even after the death of the wife.⁹¹ And during the coverture the husband and wife may be sued jointly upon any of the covenants of the lease.⁹²

§ 22. **The husband's power at common law to lease lands of the wife.** The common law from the date of the marriage regarded husband and wife as but one person, and therefore recognizes but one will between them which is placed in the husband as the better able to provide for and to govern the family. A distinction however is made by the common law as to the power and control which the husband shall have over the wife's estate between real and personal property, for he has absolute control of the personal property so that no act of hers has any force to affect his disposition or control of it.⁹³ At the common law the husband acquires by the marriage the absolute right to receive the rents and profits of lands owned by the wife. This right continues during the coverture as to all lands owned by the wife which are not settled to her separate use by an instrument which will be recognized and enforced in a court of equity.⁹⁴ Hence from this rule it follows that, at the common law, the husband may, during the coverture, execute leases of

⁸⁹ Ball v. Montgomery, 2 Ves. Jr. 194; McAfee v. Ferguson, 9 B. Mon. Ky. 475, 478.

⁹⁰ Anon. 6 Mod. 239.

⁹¹ Roll's Abr. "Baron and Feme" (G) pl. 1; Anon. 6 Mod. 239.

⁹² Anon. 6 Mod. 239.

⁹³ 10 Co. 42; 2 Inst. 510; Bacon's Abr. "Baron and Feme" C.

⁹⁴ Weens v. Bryan, 21 Ala. 302; 307; Bishop v. Blair, 36 Ala. 302; Chancey v. Strong, 2 Root (Conn.) 369; Hayt v. Parks, 39 Conn. 357; Davis v. Watts, 90 Ind. 372; More-

land v. Myall, 14 Bush. (Ky.) 474; Darnall v. Hill, 12 Gill & J. (Md.) 159; Clapp v. Stoughton, 10 Pick. (Mass.) 463, 470; Baynton v. Fin-nall, 12 Miss. 193; Burleigh v. Coffin, 22 N. H. 118, 53 Am. Dec. 236; Lucas v. Rickerich, 1 Lea. (Tenn.) 726, 728; Brasfield v. Brasfield, 12 Pickle (Tenn.) 580, 583, 36 S. W. Rep. 384; Shaw v. Partridge, 17 Vt. 626; Moore's Ex. v. Ferguson, 2 Munf. (Va.) 421; Dold's Trustee v. Geiger's Adm'r, 2 Gratt. (Va.) 98.

the lands of his wife, not settled upon her as her separate property and may enforce all his rights as lessor under such leases in an action brought in his name alone without joining that of his wife.⁹⁵ He may, however, by an appropriate instrument in writing relinquish to the wife the rents and profits to which he is entitled,⁹⁶ in which case they are absolutely free from his control and the wife may then collect the rents from the lessee and give receipts for the same.⁹⁷ This he may also do by his course of action as when, without remonstrance on his part, he permits his wife to collect the rents of her land and apply them to her own use.⁹⁸ The rents accruing during the life of the wife belong to the husband and if a tenant not having notice of the marriage pay rent to the wife during coverture, the husband may collect it again. On his death they do not belong to the wife but are assets in the hands of the personal representative of the husband and may be collected by him.⁹⁹ On the other hand the husband's personal representative cannot charge the wife for services rendered by the husband in caring for the land of the wife during the coverture or for money expended by the husband for improvements made upon them during that period.¹ It is perhaps needless to say that the rules of the common law just stated have been largely and perhaps universally modified and abrogated by modern statutory legislation in the United States. But a statute forbidding the sale of the wife's property to pay the husband's debts and forbidding the husband to sell the wife's lands without her consent does not deprive the husband of his right to the rents and profits of her land.² The rule at common law just stated is applicable to a dower interest held by the wife in the land owned by her former husband.³ Upon the death of the husband the wife at common law regains the rights which she had as a *feme sole* over all her lands remaining

⁹⁵ Shaw v. Partridge, 17 Vt. 626, 631; Clapp v. Stoughton, 10 Pick. Mass. 470.

⁹⁶ See Cheney v. Pierce, 38 Vt. 515, 524.

⁹⁷ Hayt v. Parks, 39 Conn. 357, 361.

⁹⁸ Leacester v. Biggs, 1 Taunt. 367; Cheney v. Pierce, 38 Vt. 515, 524.

⁹⁹ Shaw v. Partridge, 17 Vt. 626, 631.

¹ Burleigh v. Coffin, 22 N. H. 118, 58 Am. Dec. 236.

² Brasfield v. Brasfield, 12 Pickle (Tenn.) 580, 583, 36 S. W. Rep. 384.

³ Shaw v. Partridge, 17 Vt. 626, 631.

unsold at his death,⁴ and the same result follows where the wife obtains a divorce *a vinculo* from the husband.⁵

§ 23. **The right of a married woman to lease under the modern statutes.** The rules of the common law denying a married woman the power to lease her lands during coverture have been greatly modified and in most cases entirely abrogated in the United States. Under modern statutes she has in general the same power to take, enjoy and dispose of her property, real or personal, with its rents, issues and profits as though she were a single woman. Hence she may lease her real property and assign or sublet any terms for years, which she may own substantially to the same extent as though she were unmarried.⁶ In many of the states under the local statutory regulations which must in each case be consulted the consent of the husband or his joinder in the lease is still required.⁷ In other jurisdictions she may lease without the concurrence of her husband.⁸ So too, under some statutes she may lease her lands to her husband.⁹ A married woman may without the consent or participation of her husband make a lease of her land for a period not to exceed three years, such lease not being a conveyance of or incumbrance upon her land within the meaning of a statute which denies her the power to convey or incumber except by deed in which her husband shall join.¹⁰

§ 24. **The effect of the death of the husband or wife upon a lease made by the wife.** At the common law the power of the husband to execute a lease of the lands of the wife without her consent and which shall be binding on her during the coverture is undoubted. The question arises, Has the husband the power

⁴ Daniels v. Richardson, 22 Pick. (Mass.) 565.

⁵ Doe v. Brown, 5 Blackf. (Ind.) 309.

⁶ Knapp v. Smith, 27 N. Y. 277; Draper v. Stouvenal, 35 N. Y. 512.

⁷ Reese v. Cochran, 10 Ind. 195; Den v. Lawshee, 4 Zab. N. J. 613; Miller v. Hine, 13 Ohio, 565; Sanford v. Johnson, 24 Minn. 172; Shinn v. Holmes, 25 Pa. St. 142; Thorndell v. Morrison, 25 Pa. St. 326; Peck v. Ward, 18 Pa. St. 506. The following statutes among others may be consulted: Minne-

sota Gen. Stat. 1858, C. 61, § 108; Maryland Gen. Laws, C. 45, §§ 1-3; Rhode Island Gen. Stat. 1857, C. 136, §§ 4-8; Vermont R. S. C. 65, § 2, C. 71, § 1.

⁸ Prevost v. Lawrence, 51 N. Y. 219.

⁹ Albin v. Lord, 39 N. H. 196; State v. Hayes, 59 N. H. 450; Bank of America v. Banks, 101 U. S. 240.

¹⁰ Percy v. Henley, 82 Ind. 129; Shipley v. Smith, 162 Ind. 526, 70 N. E. Rep. 803, 804.

to lease the wife's land for a term which will extend beyond his own life? In other words would a lease made by the husband of the lands of the wife terminate with his death? It is settled that upon the death of the husband before the wife a lease made by him does not become *ipso facto* void but the wife has the right to reject or accept it. She may repudiate it by a re-entry on the land or she may affirm it by accepting the rent.¹¹ For if she accepts rent after the death of her husband she will be regarded as having affirmed the lease. It was also held in an early case that where rent was reserved under the lease of the wife's land made by the husband; and, after the entry of the lessee, the husband died before the rent became due, his widow by marrying again became estopped from rejecting the lease where her second husband received the rent. For by her re-marriage the widow was presumed at the common law to have transferred to her second husband all the power which she possessed as a widow to disaffirm or to accept the lease and for this reason his ratification of the lease was binding on her.¹² At the common law a lease by the husband and wife of land which she did not own as her separate property was voidable on the death of the wife by her heirs who may enter upon the land and terminate the lease. It is valid, however, until the actual entry of the heirs. But, by a statute¹³ the interest in the lease of the lessee was protected by continuing him in possession, preventing the heirs of the wife from taking possession until the end of the term while it was the same time held that they might collect the rent.¹⁵

§ 25. **The control of the husband over leases held by the wife as executrix.** At the common law the husband had considerable power over and control of personal property held by

¹¹ Greenwood v. Tyber, Cro. Jac. 563; Doe v. Weller, 7 T. R. 478; Jordan v. Wikes, Cro. Jac. 332, Smallman v. Agbarow, Cro. Jac. 417; Brown v. Lindsay, 2 Hill (S. C.) 542; Winstell v. Hehl, 6 Bush. (Ky.) 58. See, also, Jackson v. Mordant, Cro. Eliz. 112.

¹² Greenwood v. Tyber, Cro. Jac. 563; Worthington v. Young, 6 Ohio, 313; Trout v. McDonald, 83 Pa. St. 144; Wotton v. Hele, 2

Saund. 180 note; 1 Roll. Abr. 349 (Y) pl. 2.

¹³ Hill v. Saunders, 2 Bing. 112, 9 Moore 288, 1 Car. & P. 80; see, also, 7 D. & R. 17; 4 B. & C. 529, 28 R. R. 375; Bac. Abr. 302; Co. Litt. 45b.

¹⁴ Dyer, 159a, Rolle's Abr. 321; 1 Bac. Abr. tit. "Baron and Feme," 6, 498.

¹⁵ 32 Henry VIII C. 28.

the wife as executrix.¹⁶ He did not of course take the absolute right to or become the absolute owner in law of any property which she held when he married her or which she acquired during the coverture in a representative capacity. The common law did not give him the absolute property in chattels such as leases which she held *in autre droit*.¹⁷ The husband might however at the common law grant or demise a lease which she held as an executrix subject to the interest of those whom she represented. Thus, where a wife was administratrix of a former husband and as such was possessed of a term of years as lessee, her second husband had power to grant the term.¹⁸ Upon the death of a wife who is an executrix or administrator no property in terms of years held by her as such passes to the husband but they devolve upon the administrator *de bonis non* of the deceased wife.¹⁹ A *feme sole*, at the common law can act as a guardian in socage or by appointment under a statute. By her marriage her husband acquires no authority to possess or control the property of the ward or to receive its rents or profits, and a payment to him on account of the ward, unless with the consent of the wife is not binding either on the guardian or the ward.²⁰

§ 26. **Disposition of a term by the husband of a lessee to take effect at his death.** Though the husband may not bequeath a term which he holds by his marital right he may during the coverture grant subleases out of the term to begin after his death which will bind the wife. As he may during coverture dispose of the whole term, nothing prevents him from disposing of any part of it during the coverture. His irrevocable disposition of a portion of the term during coverture binds his estate at once though it has no operation until his death. This disposition of the chattel differs radically from a devise for a devise not being operative until his death comes too late to prevent the operation of the rule which on his death at once vests the term in the surviving wife and nullifies the devise. The portion of the term remaining after the sublease by the husband

¹⁶ Wankford v. Wankford, 1 Salk. 299, 306.

¹⁷ Co. Litt. 351a.

¹⁸ Levick v. Coppin, 3 Wils. 277;

2 W. Bl. 801; See Wankford v.

Wankford, 1 Salk. 299, 306; and Arnold v. Bidgood, Cro. Jac. 318.

¹⁹ Co. Litt. 351a.

²⁰ Holmes v. Field, 12 Ill. 424.

on the termination thereof and which he has failed to dispose of belongs to the surviving wife.²¹ If, however, the husband during coverture grants the whole term on condition which is broken, his executor may enter and the wife though surviving him is barred for there was an absolute conveyance during the coverture, and the breach of the condition was contingent and uncertain. So, too, as the breach happened after the death of the husband the disposition was continuous and unbroken during his life. On the other hand if the breach occurs during the life of the husband and he re-enters for the breach the *status quo* is restored and his possession thereafter is precisely the same as it was before. If the wife survive him she will take precisely as though the disposition never had been made by him. If, however, the husband shall merely charge the term with the payment of a rent and die, the wife is no longer bound because the term itself, not having been disposed of, all intermediate grants end with his life.²²

§ 27. **Leases of community property.** In some of the western states an ownership of property by the husband and wife called "community property" is recognized. The decisions are not harmonious on the question of the power of the husband to make a valid lease of the community property. In the state of California the courts hold, in accordance with the law of Mexico from which the California law is derived, that the title to the property held in community is in the husband and for that reason he can dispose of it absolutely as though it were his own. He may sell it²³ or he may mortgage²⁴ without the wife's consent. That is to say he can transfer or incumber it by a deed signed by him alone. It follows therefore that he may lease the community property for a term of years and collect and use the rents of the same. In Washington the law is otherwise. In that state the matter is regulated by a statute under which a lease of the community property must be signed by the wife. The statute forbids the husband to encumber the community property. In that state unless the wife joins in the lease of the community

²¹ Loftus Case, Cro. Eliz. 279.

²² Co. Litt. 46b, 351a; Bracebridge v. Cook, Plowd. 418.

²³ Fuller v. Ferguson, 26 Cal. 546; Tustin v. Fought, 23 Cal. 237.

²⁴ Bernal v. Gleim, 33 Cal. 668;

Tolman v. Smith, 85 Cal. 280; Barchman v. Byrne, 83 Cal. 23.

property, it is void,²⁵ and the lessee enjoys no rights thereunder provided he knew the land was community property. It seems under the statute that a tenant who did not know the lease was community property may abandon the land. He must, however, demand a valid lease before he does so and the refusal of the wife to grant it will exempt him from the payment of rent.²⁶ Not only may the tenant refuse to pay rent but he may, after the wife has refused to sign the lease recover damages against her.²⁷ And if a tenant has entered under a lease signed by the husband only he may procure a specific performance of the lease against the wife where it was executed with her knowledge and consent though not signed by her.²⁸

§ 28. **The modern rule as to the relation of the mortgagor and mortgagee.** In order to understand the position of the tenant of a mortgagor as regards the mortgagee before the condition of the mortgage is broken, we must state a general principle relating to the law of real estate mortgages. By the modern rules of law, and also in equity, a mortgagor in possession of the premises is regarded as the legal owner and the mortgage conveyance is regarded as a security. The mortgage conveys no title to the land. The mortgagee has but a chattel interest and the mortgagor continues to hold the freehold. The mortgagor, being the legal owner and in possession, may lease the land and he and his grantee are entitled to the rents and profits and they may sue the lessee to recover them.²⁹ A mortgagor has a right to the possession in modern times at least until entry by the

²⁵ *Snyder v. Harding*, 34 Wash. 236, 75 Pac. Rep. 812.

²⁶ *Isaacs v. Holland*, 4 Wash. 54, 57, 29 Pac. Rep. 976; *Tryon v. Davis*, 8 Wash. 106, 35 Pac. Rep. 598.

²⁷ *Dietz v. Winehill*, 6 Wash. 109, 32 Pac. Rep. 1056.

²⁸ *Payne v. Still*, 10 Wash. 433, 38 Pac. Rep. 994.

²⁹ *Jackson v. Lodge*, 36 Cal. 28, 41; *Mark v. Witzler*, 39 Cal. 247; *Elfe v. Cole*, 26 Ga. 197; *United States Bank v. Athens Armory*, 35 Ga. 344; *West v. Adams*, 106 Ill. App. 114; *Priest v. Wheelock*, 59 Ind. 497; *White v. Wittemeyer*,

30 Iowa, 268; *Norcross v. Norcross*, 105 Mass. 265; *Miner v. Beekman*, 11 Abb. Prac. (N. Y.) 147; *O'Dougherty v. Felt*, 65 Barb. (N. Y.) 220; *Mason v. Lenderoth*, 88 A. D. 38, 84 N. Y. Supp. 740; *Wyckoff v. Scofield*, 98 N. Y. 475; *Williams v. Beard*, 1 S. Car. 309; *Thayer v. Cramer*, *McCorð*, (S. Car.) Ch. 395; *Buchanan v. Munroe*, 22 Tex. 537; *Whalin v. White*, 25 N. Y. 462, 465; *Astor v. Turner*, 11 Paige (N. Y.) 436; *Lawrence v. Conlan*, 28 Misc. Rep. 44, 56 N. Y. Supp. 345.

mortgagee or until the premises are sold under a foreclosure. After a breach of the condition his possession may be terminated at any time by the mortgagee, though he is not on that account a tenant of the mortgagee. So long as the mortgagor or his tenants are by the mortgagee permitted to remain in possession, whether before or after condition broken, the mortgagor is entitled to receive the rents and use them for his own account and benefit.³⁰ The law will not imply a contract between a mortgagor holding over after a default and a mortgagee, that rent or even the reasonable value of the use and occupation of the premises shall be paid.³¹ The same rules apply to a deed which is absolute in form and without any defeasance if the purpose of the deed is to secure a debt.³² The possession which the mortgagor holds is, according to the above considerations a possession in his own right. It is not a possession as a tenant at sufferance of the mortgagee.³³ It follows therefore that all leases made by him subsequent to the mortgage are valid as against the mortgagee down to the sale under foreclosure. Hence, a mortgagee who takes a lease of the mortgaged premises from the mortgagor before condition broken and while the mortgagor is in the actual occupation of the land is a tenant of the mortgagor.³⁴ A lease by the mortgagee is absolutely void, where under the statute or otherwise, the mortgagor is entitled to possession until foreclosure. The lease confers no right to possession.³⁵

§ 29. **The right of the mortgagee to the rent at common law.** The common law regards a mortgage in substance and effect as an assignment of the reversion. Thus, a mortgage transfers all the title which the mortgagor had and confers on the mortgagee the right to enter and hold possession of the estate in the absence of a stipulation that until a breach of the condition the mortgagor should hold possession. The mortgagee having en-

³⁰ Willington v. Gale, 7 Mass. 138; Mayo v. Fletcher, 14 Pick. (Mass.) 525, 531; Moss v. Gallimore, 1 Doug. 269, 282.

³¹ Mayo v. Fletcher, 14 Pick. (Mass.) 525, 533; Gibson v. Farley, 16 Mass. 280; Wilder v. Houghton, 1 Pick. (Mass.) 87.

³² Jackson v. Lodge, 36 Cal.

28-41; Johnson v. Sherman, 15 Cal. 287.

³³ Hopper v. Wilson, 12 Vt. 695; Crippen v. Morrison, 13 Mich. 23; Kidd v. Temple, 22 Cal. 255.

³⁴ Wood v. Felton, 9 Pick. (Mass.) 171.

³⁵ Connolly v. Giddings, 24 Neb. 131, 134, 37 N. W. Rep. 939.

tered is held responsible for the rents and profits of the premises for which he must account to the mortgagor. He must apply them to the payment of the mortgage debt and, if there is a surplus, it would have to be paid to the owner of the equity of redemption.³⁶ Where the premises are not occupied by a tenant the mortgagee may enter at once and lease them according to the rule of the common law. If the premises at the date of the mortgage are under lease for a term of years the mortgagee cannot disturb the possession of the lessee who has a prior title to his and therefore he cannot enter. But inasmuch as at common law the mortgage is regarded as a conveyance of the reversion the mortgagee may give notice to the lessee of the mortgagor who is in possession under a lease prior to the mortgage, and he will thereafter become entitled to collect the rent due under the lease and which may subsequently become due and also to enforce all the remedies which the mortgagor has and ever had against the tenant.³⁷ Tenants who have not received notice of the mortgagee who pay rent to the mortgagor are protected.^{37a} But rents which are due and payable when the mortgagee receives his conveyance or which become due and payable before he notifies a prior lessee of his right to collect rent, are mere chattel interests or debts due from the tenant to the mortgagor, which are wholly disconnected from the reversion and do not pass by an assignment of it.^{37b} The tenant of a mortgagor whose lease is prior to a mortgage by continuing in possession after a notice from the mortgagee to pay rent to him, becomes by implication the tenant of the latter, according to the terms of the lease signed by the mortgagor.^{37c} The mortgagee cannot however

³⁶ Robinson v. Robinson, 1 N. H. 161; Onderdonk v. Gray, 19 N. J. Eq. 65; Myers v. Estell, 48 Miss. 372; Kellogg v. Rockwell, 19 Conn. 446; Harrison v. Wyse, 24 Conn. 1; Reitanbaugh v. Ludwick, 31 Pa. St. 131.

³⁷ Mansony v. U. S. Bank, 4 Ala. 746; Coker v. Pearsall, 6 Ala. 342; Baldwin v. Walker, 21 Conn. 168, 181; Moore v. Titman, 44 Ill. 367; Russell v. Allen, 2 Allen (Mass.) 42, 43; Clark v. Abbott, 1 Md. Ch. 474, 478; Babcock v. Kennedy,

1 Vt. 457; Newall v. Wright, 3 Mass. 138, 159; Fitchburg Cotton Mfg. Co. v. Melven, 15 Mass. 268, 270; Burden v. Thayer, 3 Met. (Mass.) 79; Mirick v. Hoppen, 118 Mass. 282; Moss v. Gallimore, Doug. 278, 279.

^{37a} Russell v. Allen, 2 Allen (Mass.) 42.

^{37b} Burden v. Thayer, 3 Met. (Mass. 79.

^{37c} Brown v. Story, 1 M. & G. 114.

by giving the prior lessee notice to pay rent to him after condition broken compel him to remain as his tenant on the terms of the original lease. Unless the lease has been in fact or in legal contemplation assigned to the mortgagee no privity of contract exists between him and a lessee whose lease antedates his mortgage. The lessee may therefore on receipt of notice from the mortgagee surrender possession if he shall do so in a reasonable time and he cannot thereafter be held liable for rent either to the mortgagor, who was his lessor, or to the mortgagee. His payment of rent to the mortgagee is a good defense in an action by the mortgagor or by the grantee of the reversion.³⁸ The rules and the rights and liabilities of the parties at common law are very different where a lease is made after a mortgage by a mortgagor who remains in possession by his lessee of the mortgaged premises. There is in such case no privity of contract or estate between the mortgagee and the lessee who stands in the place of and is subject only to the obligations of the mortgagor to the mortgagee, of whom rent cannot be collected so long as he is allowed to remain in possession of the premises. Hence until the mortgagee has actually entered or some equivalent act has occurred, the mortgagee can maintain no action against the lessee for the recovery of rent except on an express promise to pay.³⁹

§ 30. **The appointment and powers of receivers in foreclosure.** The rules regulating the appointment of receivers in foreclosure proceedings belong more properly to the subject of mortgages than they do to the topic of landlord and tenant. Some general

³⁸ *Smith v. Taylor*, 9 Ala. 633; *Massachusetts Life Ins. Co. v. Wilson*, 10 Met. (Mass.) 126; *Myers v. White*, 1 Rawle (Pa.) 355; *Weidner v. Foster*, 2 P. & W. (Pa.) 23.

³⁹ *Baldwin v. Walker*, 21 Conn. 168, 181; *Fitchburg Cotton Mfg. Co. v. Melven*, 15 Mass. 268; *Field v. Swan*, 10 Met. (Mass.) 112, 114; *The Massachusetts Hosp. Life Ins. Co. v. Wilson*, 10 Met. (Mass.) 126, 127; *McKircher v. Hawley*, 16 Johns. (N. Y.) 289;

Watts v. Coffin, 11 Johns. (N. Y.) 495; *Partington v. Woodcock*, 5 Nev. & Man. 672, 36 E. C. L. 418, 6 Ad. & El. 690, 698; and see, also, *Peters v. Elkins*, 14 Ohio. 344; *Rogers v. Humphreys*, 4 A1. & El. 299, 313; *Hughes v. Bucknell*, 8 Car. & P. 566; *Evans v. Elliot*, 9 Ad. & El. 342; *Higginbotham v. Barton*, 11 Ad. & El. 307; *Burrows v. Grandin*, 1 Dowl. & L. 213; *Wheeler v. Branscombe*, 5 Q. B. 373.

consideration, however, may be touched upon in this place. In the first place the mortgagee, unless he has stipulated for the rents and profits of the estate, is not entitled to receive them until he has acquired possession. It follows therefore that something more than merely the failure to pay the debt is required to entitle the mortgagee to the appointment of a receiver. Where the mortgagor is insolvent, or where there is danger that the rents will be wasted or misappropriated, or the property neglected or wasted during the foreclosure, a receiver of the rents may be appointed. The purpose of the appointment of the receiver is to preserve the subject matter of the litigation. In order therefore that the receiver may be appointed it must be shown that there is a likelihood of the mortgagee suffering a loss. If on the other hand it appears that there is no apparent danger that the mortgagee will suffer if a receiver of the rents is not appointed, the court will not give him this relief.⁴⁰ If it appears from the circumstances that a receiver ought to be appointed it will be his duty to collect the rents of the mortgaged premises and to apply the net proceeds thereof, after deducting the expenses of administration to the payment of the mortgage debt. Notice of the appointment of the receiver should be brought promptly to the tenant's knowledge.⁴¹ A receiver appointed in foreclosure is entitled to collect rents that accrue in the future or which, if they have accrued, are in the hands of the tenant when he receives notice of the receivership. He has no title to, nor can he collect rents from the lessor or owner which the latter has received prior to the appointment of the receiver.⁴² And even where a tenant has paid rent in ad-

⁴⁰ *Myers v. Estell*, 48 Miss. 372, 406; *Meyer v. Thomas*, 131 Ala. 65, 21 So. Rep. 494; *Moritz v. Miller*, 87 Ala. 331, 6 So. Rep. 209; *Polland v. Fertilizer Co.*, 122 Ala. 409, 25 So. Rep. 169.

⁴¹ The right to the appointment of a receiver in an action to foreclose a lien for rent created by the lease, would presumably be based upon the same considerations as are recognized in the foreclosure of a mortgage. If the tenant has sublet the premises

and there is danger that the rents due from the sub-tenants may be wasted, the court may, in an action to foreclose a lien contained in the original lease appoint a receiver of these rents. The character of the lease and its language creating the lien will always be considered. *Mavor v. Northern Trust Co.*, 93 Ill. App. 314.

⁴² *Howell v. Ripley*, 10 Paige (N. Y.) 43; *Argall v. Pitts*, 78 N. Y. 239, 242; *Whycoff v. Scofield*, 98 N. Y. 475, 478; *Rider v. Bagley*,

vance to the mortgagor before the appointment of a receiver in foreclosure was known to the tenant, the receiver cannot recover the rent from the tenant.⁴³ But a receiver may prevent a lessor from collecting the rents of the premises from the subtenants of the lessee though the latter has paid his rent in advance to the owner of the freehold.⁴⁴ In conclusion it may be said that the tenants may, by the process of the court, be compelled to pay their rent to the receiver and that his right to collect the rent is superior to the rights of the creditor of the mortgagor under a judgment which is rendered after the receiver was appointed.⁴⁵

§ 31. **The effect of a foreclosure on the tenant's rights.** According to modern theories, a tenant of a mortgagor is entitled to possession as against the mortgagee. There is no privity of contract between the tenant of the mortgagor and the mortgagee by which, before the foreclosure, the tenant owes any duty to the mortgagee; but the sale under a foreclosure which cuts off the equity of redemption destroys all the rights of tenants whose leases were executed subsequently to the mortgage which is foreclosed provided they are made parties to the action.⁴⁶ The tenants are divested of their estate by the decree and the sale thereunder and they are thereafter trespassers, or at the best tenants at sufferance of the purchaser, at the foreclosure sale.⁴⁷ A lessee takes the property subject to all rights of a mortgagee whose mortgage is on record at the date of the lease. But the fact that the mortgage gives the mortgagee a right to have a receiver appointed does not destroy any rights which the tenant may have under the lease except that, upon notice to him, he must pay the receiver the rents.⁴⁸ And the receiver can collect only such rents as accrue and are not paid to the owner of the equity

84 N. Y. 461, 465; *Hollenbeck v. Donnell*, 94 N. Y. 342.

⁴³ *Hartley v. Meyer*, 2 Misc. Rep. 56, 49 N. Y. St. Rep. 351, 20 N. Y. Supp. 855.

⁴⁴ *Fletcher v. McKeon*, 75 N. Y. Supp. 817, 71 A. D. 278.

⁴⁵ *Woodwatt v. Connell*, 38 Ill. App. 475.

⁴⁶ *Oakes v. Aldridge*, 46 Mo. App. 11; *Crippen v. Morrison*, 13 Mich. 23, 35; *Kidd v. Temple*, 22

Cal. 255; *Tucker v. Keeler*, 4 Vt. 161; *Thompson v. Flathers*, 45 La. Ann. 120; *Hartley v. Meyer*, 2 Misc. 56, 20 N. Y. Supp. 855.

⁴⁷ *McFarland R. E. Co. v. Joseph Gerardi Hotel Co.*, 202 Mo. 597, 607, 100 S. W. Rep. 577; *Culverhouse v. Wortz*, 32 Mo. App. 419.

⁴⁸ *Fletcher v. McKeon*, 71 A. D. 278, 75 N. Y. Supp. 817.

of redemption.⁴⁹ Any rights which the lessee may have to remove his fixtures, or to recover on a covenant of the lease from his landlord, he will be able to enforce down to the time that the property is sold on the foreclosure. The mere fact that the tenant whose lease was subsequent to the mortgage continues in possession after the mortgagee notifies him of the mortgage and demands rent from him does not constitute him a tenant of the mortgagee in the absence of other circumstances from which a tenancy could be implied.⁵⁰

§ 32. **The right to rents of the purchaser at the sale under foreclosure.** The mortgagor may collect rents accruing from his tenants down to the day of the delivery of the deed to the purchaser at foreclosure.⁵¹ To protect himself the purchaser, as soon as he receives the deed, should at once notify all the tenants that he claims to receive all rent from them which may thereafter accrue. Usually the decree directs that he be let into possession on the presentation of the deed. The title of a purchaser on foreclosure is not perfect nor is he entitled to any rent payable in advance until he has fully complied with a direction in the decree in foreclosure requiring him to produce to the tenant the deed of the sheriff and a certified copy of an order confirming the sale.⁵² Where a judgment in foreclosure provides that the purchaser at the foreclosure sale shall be let into possession upon the production of the deed, he does not acquire title, or the right to collect the rents until he receives his deed. The mortgagor up to that time continues to be the owner and may legally collect the rents. Nor can the purchaser subsequently recover from him rents which he has collected prior to the delivery of the deed. Neither can he recover rents from the tenants which are payable in advance after the foreclosure sale, unless he shall promptly notify the tenants that he is

⁴⁹ Wyckoff v Scofield, 98 N. Y. 475; Rider v. Bagley, 84 N. Y. 461.

⁵⁰ Towerson v. Jackson, 61 L. J. J. B. 36 (1891), 2 Q. B. 484, 65 L. T. 332, 40 W. R. 37, 56 J. B. 21.

⁵¹ Whalin v. White, 25 N. Y. 462, 465; Mitchell v. Bartlett, 51 N. Y. 447, 451; Peck v. Knickerbocker Ice Co., 18 Hun (N. Y.) 183; Cummings v. Rosenberg, 6

Misc. Rep. 538, 27 N. Y. Supp. 124, 58 N. Y. St. Rep. 11; O'Neill v. Morris, 28 Misc. Rep. 613, 59 N. Y. Supp. 1075; Mason v. Lenderoth, 84 N. Y. Supp. 740, 741; Astor v. Turner, 11 Paige (N. Y.) 436; Clason v. Gorley, 5 Sandf. (N. Y.) 447.

⁵² Whalin v. White, 25 N. Y. 462, 464.

the owner.⁵³ And this rule as to the collection of rents, applies to a case where the mortgagor himself remains in possession after the foreclosure sale. The purchaser on foreclosure may treat him as a trespasser, or as a tenant; but he cannot collect rent from a mortgagor holding over after foreclosure prior to a demand on him for possession or for the payment of rent if he desires to remain.⁵⁴ This rule applicable to the mortgagor holding over does not apply however where the mortgage expressly declares that the mortgagor shall become the tenant of the purchaser at the foreclosure sale. The purchaser may collect rent from the day of the delivery to him of the deed without demand, or notice to the mortgagor holding over.⁵⁵

§ 33. **The power of the federal government to lease lands.** Express power to lease land for governmental purposes is usually conferred by act of congress upon those federal officials within the scope of whose duties lies the occupation of land. The occupation of land by the federal government, with the consent of the owner and without an assertion of ownership on the part of the United States, raises a presumption that the relationship of landlord and tenant exists between the government and the owner of the land.⁵⁶ The federal government will then be held liable to pay the owner the reasonable value of the use and occupation of the land where no rent has been agreed upon between the parties.⁵⁷ For the presumption in all such cases is that the

⁵³ David Bradley & Co. v. Peabody Coal Co., 99 Ill. App. 427.

⁵⁴ North American Trust Co. v. Burrow, 68 Ark. 584, 60 S. W. Rep. 950.

⁵⁵ Griffith v. Brackman, 97 Tenn. 387, 37 S. W. Rep. 273.

In Massachusetts it has been held that a mortgagee who enters on breach of condition may collect rent from the tenant in possession and may expel him if he does not pay the rent. *Stone v. Patterson*, 19 Pick. (Mass.) 476. The purchaser at partition is entitled to possession from the date of the sale. If a tenant be in possession, the purchaser will be en-

titled to rent from that date. If the owner has collected rents in advance, and this was not known to the purchaser when he bought, he will be entitled to a rebate upon his bid to that amount. *Winfrey v. Work*, 75 Mo. 55.

⁵⁶ *Chills v. United States*, 16 Ct. Cl. 79; *Langford v. United States*, 12 Ct. Cl. 333. The local law of landlord and tenant is then applicable. *Clifford v. United States*, 34 Ct. Cl. 223. *Spofford v. United States*, 32 Ct. Cl. 452.

⁵⁷ *Clifford v. United States*, 34 Ct. Cl. 223, which also holds that proof of the use and occupation of the premises by the Federal

entry of the federal officials upon the land was made with an intention on their part of observing the constitutional obligation not to take property without due process of law and that they expected to pay adequate and proper compensation and also that the assent of the owner to the use of the land by the government was given with an expectation on his part that he would receive compensation.⁵⁸ Aside from statutory authorization a postmaster has no power to bind the United States by a lease of premises for use as a postoffice. But the occupation of premises by a postmaster for governmental purposes in connection with the performance of his duties as postmaster may raise an implied contract on the part of the federal authorities to pay the owner the reasonable value of the use and occupation of the premises.⁵⁹ It has also been held that a lease entered into by an officer of the government for a term of years is obligatory upon the United States only until the end of the fiscal year in which it was made with an option in the government to renew it from year to year until the end of the term specified; and, if the government abandons the premises in the middle of the fiscal year, or at any time during such year, the landlord may recover the rent down to the end of that fiscal year but no longer.⁶⁰ Nor will the occupancy of the premises after the expiration of such year by a federal official have the effect of continuing the lease, or afford the landlord an opportunity to treat the government as holding over where the occupancy by the official is unauthorized.⁶¹ In order that the United States shall be liable in an action for the use and occupation of land the use and occupation must have been with the owner's consent. Where the United

government is sufficient to establish the relationship of landlord and tenant.

⁵⁸ *Clifford v. United States* 34 Ct. Cl. 223.

⁵⁹ Postoffice: "While no contract that a postmaster can make for the use of a building can be binding on the government, as to the time of occupying or price to be paid, or any other matters whatever, he may undoubtedly take possession of any building suitable and necessary for the ex-

igencies of the office, and leave the owner to his remedy in the courts for compensation on an implied assumpsit, which would arise under the constitution whenever private property is taken for public use. *Semmes v. United States*, 26 Ct. Cl. 119, distinguishing *Bradley v. United States*, 13 Ct. Cl. 166, 98 U. S. 104.

⁶⁰ *Smoot v. United States*, 38 Ct. Cl. 418.

⁶¹ *Smoot v. United States*, 38 Ct. Cl. 418.

States in the prosecution of the war of the Rebellion took possession of certain premises on land adjacent to that upon which a battle was fought, and used the same as a hospital for sick and wounded soldiers for several months, leaving the premises ultimately in a dilapidated and ruinous condition, the owner cannot in the absence of statute recover for their use and occupation. The relation of landlord and tenant does not exist between the parties, as the land was occupied without the consent of the owner. Congress, however, has provided by statute that under certain circumstances the owner of land may be compensated for the use of his land occupied by the government. But the statute does not create the conventional relation of landlord and tenant between the owner and the government or render the latter liable for remuneration for being deprived of the use of the premises during the period he was necessarily occupied in repairing the damages done while the army was in occupation.⁶²

§ 34. **The validity of leases of land owned by Indians.** In theory at least the Indians are regarded as the wards of the federal government. It has been held that a state legislature has no power to authorize leases of Indian lands held in reservation.⁶³ The matter is always regulated by treaty or federal statute. In the absence of treaty or act of congress expressly conferring power upon Indians who are settled upon reservations to lease their lands, a lease by them of such land, particularly to a white person, is void.⁶⁴ So a note for rent of reservation land cannot be enforced where the leasing of such land is forbidden by act of congress.⁶⁵ For it is the general rule that the right of the Indian nations or tribes to their lands within the United States is a right of possession or occupancy only. The title to the fee of the lands occupied by Indians is in the United States and the Indian title cannot be conveyed wholly or in part to any one except to the United States.⁶⁶ A good and valid

⁶² *Madison Female Sem. v. United States*, 23 Ct. Cl. 188, 191.

⁶³ *Buffalo R. & P. Co. v. Lavery*, 75 Hun, 396, 27 N. Y. Supp. 443.

⁶⁴ *Baker v. Jones*, 38 Hun (N. Y.) 625.

⁶⁵ *Chaffee v. Garrett*, 6 Ohio, 421. Act. Cong. July 30, 1834 (U. S. R. S. § 2116) provides no lease of

land from any Indian nation "shall be of any validity in law or in equity unless the same is made by treaty or convention entered in pursuant to the constitution. *Cherokee Strip Live-Stock Ass'n v. Cass Land & Cattle Co.*, 138 Mo. 394, 40 S. W. Rep. 107.

⁶⁶ *Jones v. Meehan*, 20 S. Ct. 1,

grant of a part of lands owned or occupied by an Indian tribe or nation may be made to an individual passing to, and vesting in him the fee simple of said lands by the execution of a treaty between the Indian occupants of the land and the United States. The title becomes vested by virtue of the treaty as soon as it goes into operation without the passage of any act of congress or the issuance of any patent from any executive department of the federal government.⁶⁷ So also, where by a treaty

175 U. S. 1, 44 Law. ed. 49, citing cases. In the early and leading case of *Johnson v. McIntosh*, 8 Wheat. 453, 5 Law. ed. 681, decided in 1823, it was held that grants of land northwest of the river Ohio made in 1773 and 1775 by the chiefs of certain Indian tribes to private individuals conveyed no title which could be recognized in the Federal Courts and Chief Justice Marshall in delivering judgment said: "The usual mode adopted by the Indians for granting lands to individuals has been to reserve them in a treaty, or to grant them under the sanction of the commissioners with whom the treaty was negotiated." The early statute on this topic is act of July 22, 1790, which invalidated the sale of Indian lands to any person unless such sale was made and duly executed at some public treaty held under the authority of the United States, 1 Stat. at L. 138. See, also, act of March 1, 1793, 1 Stat. at L. 330, in which it was provided that no purchase or grant of lands, or of any title or claim thereto from any Indians or nation or tribes of Indians shall be valid unless the same be made by treaty or convention. This provision was subsequently re-enacted in acts May 19, 1796, chap.

30, sec. 12, and March 3, 1799, substituting for the words "purchase or grant" the words "purchase, grant, lease or other conveyance." See, 1 Stat. at L. 472, 746. This language of the temporary acts of 1796 and 1799 was repeated in the first permanent enactment upon the subject being the act of March 30, 1802, ch. 13 § 12. 2 Stat. at L. 143.

⁶⁷ *Jones v. Meehan*, 20 S. Ct. 1, 175 U. S. 1, 44 Law. ed. 49; citing *Mitchell v. United States*, 9 Peters (U. S.) 711, 748, 9 Law. ed. 283, 296; *Doe d. Godfrey v. Beardsley*, 2 McLean C. C. 417, 418; *United States v. Brooks*, 10 How. (U. S.) 442, 460, 13 Law. ed. 489, 496; *Holden v. Joy*, 17 Wall. (U. S.) 211, 247, 21 Law. ed. 523, 535; *Best v. Pold*, 18 Wall. (U. S.) 112, 116, 21 Law. ed. 805, 807. In construing a treaty between the United States and an Indian tribe or nation in order to ascertain whether some stranger to it may claim a valid title to land under it the character of the parties to the treaty must be taken into consideration. The fact must be remembered that the negotiations are carried on by federal officials who are skilled in diplomacy, masters of a written language, understanding the proper and technical language em-

between the United States and an Indian tribe the rights of the nation are extinguished and certain portions of the land which was formerly occupied by the Indians as a tribal reservation are reserved, by the treaty, to certain Indians in severalty as individuals, the individual Indian allottees take the fee simple which is alienable at their pleasure unless the United States has by act of congress or by a provision in the treaty expressly or impliedly prohibited alienation. The reservation to certain individual Indians is part of the consideration of the cession by the tribe of its right by the treaty. Nor does it follow because before the reservation only the government can purchase from the Indians that after the reservation and creation of absolute individual rights by and under the treaty and with the consent of the United States the individual reservees cannot alien. The title thus created is property and alienable unless the government has forbidden its sale. And if the property can be sold it can with equal propriety be leased by its individual owner.⁶⁸ It is always competent however for congress to provide that land allotted to Indians in severalty shall not be alienable. Hence it follows that in a case where by an act of congress reservation lands are allotted to the Indians in severalty, and it is also provided that these Indians shall on receiving the lands in severalty

played to create estates at common law and assisted by an interpreter employed by themselves on the one hand and by Indians a weak, ignorant and dependent class of persons, possessing no written language of their own, usually not familiar with the language in which the treaty which they sign is written and wholly ignorant of legal language or phraseology even when it may happen that they have some knowledge of English. It follows because of this condition of affairs that when it becomes necessary to ascertain the extent and character and an interest in land which is claimed under a treaty its language must be construed, not according to the technical

meaning of the words to lawyers but the sense in which they would naturally be understood by the Indians. *Kansas Indians*, 5 Wall. (U. S.) 737, 760, *sub nom.*; *Blue Jacket v. Johnson County Com'rs*, 18 Law. ed. 667; *Wan-Jap-EAh v. Miami County Com'rs*, 18 Law. ed. 674; *Choctaw Nation v. United States*, 119 U. S. 1, 27, 28, 30 Law. ed. 306, 314, 315, 7 Sup. Ct. 75.

⁶⁸ *Jones v. Meehan*, 20 Sup. Ct. 1, 175 U. S. 1, 44 Law. ed. 49, affirming 70 Fed. Rep. 453; *United States v. Brooks*, 10 How. (U. S.) 442, 13 Law. ed. 489; *Crews v. Burcham*, 1 Black. 352, 17 Law. ed. 91; see also *Wilcoxon v. Hybarger*, 1 Ind. Ter. 138, 38 S. W. Rep. 669, 670.

become citizens of the United States and have and enjoy all the rights of such citizens, but the statute forbids the alienation of such lands, a lease of land thus held by an Indian is void.⁶⁹ A lease of land in Indian Territory by citizens of the United States is valid to all intents and purposes where all the requisites of a valid contract have been complied with. A law of an Indian nation prohibiting the leasing of lands in that territory does not apply to the leasing or holding by citizens of the United States of lands located there. The lessee of such lands being a white man is subject to the general rules of the law of landlord and tenant as if the property were located in any state of the union and to the provisions of the statutes enacted by congress for the government of the territory.⁷⁰ In unlawful detainer between persons not citizens of the Cherokee nation, a demurrer to the complaint on the ground that it was based on a refusal to pay rent, which was prohibited by law, is without merit as there is no law prohibiting the payment of rent in such territory. Thus a law of an Indian nation requiring all persons, not citizens of the nation owning houses for the purpose of renting them, to dispose of them within a certain time, does not, as between parties who are citizens of the United States but not citizens of the Indian nation, invalidate a lease of property held in violation of that law.⁷¹ For it is a general rule that the validity of a contract between citizens of the United States which is valid under the laws of the United States and of the state in which it is made cannot be affected by the customs or laws of the Indian tribes in whose territory the contract is executed.⁷²

⁶⁹ *Beck v. Flournoy Live Stock & Real Estate Co.*, 12 C. C. A. 497, 65 Fed. Rep. 30, 27 U. S. App. 618; *United States v. Flourney Live Stock & Real Estate Co.*, 69 Fed. Rep. 886; *Pilgrim v. Beck*, 69 Fed. Rep. 895.

⁷⁰ *Walker Trading Co. v. Grady Trading Co.*, 1 Ind. Ter. 191, 39 S. W. Rep. 354; In *Ellis v. Fitzpatrick*, (Ind. Ter.) 64 S. W. Rep. 567 this case was cited and approved and it was expressly held that in unlawful detainer be-

tween persons not citizens of the Cherokee nation, a demurrer to the complaint on the ground that it was based on a refusal to pay rent, which was prohibited by law, is without merit as there is no law prohibiting the payment of rent in such territory.

⁷¹ *Walker Trading Co. v. Grady Trading Co.*, 1 Ind. Ter. 191, 39 S. W. Rep. 354.

⁷² *Anheuser-Busch Brewing Ass'n v. Bond*, 66 Fed. Rep. 633, 13 C. C. A. 665.

§ 35. **Leases by aliens.** At the common law an alien friend may take a fee simple in land though he has no capacity to hold. for, upon office found, the king takes the land under his prerogative.^{72a} The alien may while in possession lease his land and his lease will be valid as against himself. The lessee's interest in and title to the term being founded solely on the title of his alien lessor will be subject to the possibility of termination by a proceeding which terminates the title of the latter.

§ 36. **Leases to aliens.** At the common law an alien being a friend might take, hold and transfer personal property to the same extent and with the same power as a citizen. In relation to real estate he was under certain disabilities which are not necessary to enumerate here. As to the capacity of an alien to hold land under lease under the English law a distinction was made between the lease of a house for the habitation of a merchant, being an alien friend and a lease of premises consisting of meadows, pastures, forests or farm lands. His holding of the latter under a lease for a term of years was always subject to office found.⁷³ He might, however, hold under a lease a house for habitation as against all the world for this was necessary and allowable in favor of trade, for without a dwelling he could not carry on his trade in the kingdom.⁷⁴ But in England by statute it was also provided⁷⁵ that all leases of houses or shops to aliens being artificers or handicraftsmen should be void. The courts, however, in construing this statute, when it was set up as a defense in an action to recover rent on a lease were very prone to confine its operation very strictly.⁷⁶

§ 37. **The effect of the death of the lessee on leases for terms of years.** The interest of lessees in leases for years being at the common law mere chattel interests, though the terms which are created by the leases may be for a thousand years, on the death of the lessee passes to and becomes vested in the executor or administrator of the lessee.⁷⁷ For terms for years, unlike leases at will,

^{72a} Co. Litt. 2b.

⁷³ Calvin's Case, 7 Coke, 2b.

⁷⁴ Co. Litt. 2b.

⁷⁵ 32 Henry VIII., c. 16, s. 13.

⁷⁶ Bridgham v. Frontec, 3 Mod. 94; Pilkington v. Peach, 2 Show. 135; Jevan v. Harridge, 1 Sid. 308, 2 Keb. 116.

⁷⁷ Cody v. Quarterman, 12 Ga. 386; Schee v. Wiseman, 79 Ind. 389; Cunningham v. Baxley, 96 Ind. 367; Lewis v. Ringo, 3 A. K. Marsh. (Ky.) 247; Journe's Succession, 21 La. An. 391; Dillingham v. Jenkins, 7 S. & M. (Miss.) 479, 487 (lease for ninety nine

not ordinarily terminated by the death of the lessee during the term but survive and pass to his personal representative.⁷⁸ It is not material in connection with this rule that a lease for years be expressly given to a man and his heirs or anciently to a sole corporation and his successors as in any case it goes to the lessee's personal representative upon the death of the lessee.⁷⁹ So, also, a lease to A, his executors, etc., for a year, and so on from year to year for so long as it shall please the lessor and A, his executors, etc., does not expire on the death of A, but on that event happening, vests in his executors.⁸⁰ A lease for years to one without naming heirs or executors, would by operation of law, in case the lessee dies testate, vest in his executors, and no words of limitation would alter the succession.⁸¹ The personal representative, if there is one, is entitled to notice to

years). *Webster v. Parker*, 42 Miss. 465, 471 (lease for ninety nine years); *Faber v. Mc Rae*, 56 Miss. 227, 229; *Sutter v. Lackman*, 39 Mo. 91; *Green v. Green*, 2 Redfield Sur. (N. Y.) 408; *Doe d. Shore v. Porter*, 3 Term Rep. 13, 1 R. R. 626. S. P., *James v. Dean*, 15 Ves. 241, 8 R. R. 171; *Murdock v. Ratcliff*, 7 Ohio St. 1, *Wiley's Appeal*, 8 Watts & S. (Pa.) 244; *Payne v. Harris*, 3 Strobb. Eq. (S. Car.) 39. *Contra* in *McKee v. Howe*, 17 Colo. 538, 31 Pac. Rep. 115, where a statute was construed which provided that "real estate" should embrace chattels real and all interests in land in fee, for life or for years, and lands, tenements and hereditaments and all interests therein, it was held that a lease for years was real property on the death of the lessee and devolved upon his heir and not upon his administrator. See also as to the character of a perpetual lease which in Ohio has been by the statute divested of its chattel qualities and is now descendible to the lessee's heirs.

Gansen v. Moarman, 5 Ohio S. & C. P. Dec. 287.

⁷⁸ *Alsop v. Banks*, 68 Miss. 664, 9 So. Rep. 895, 24 Am. St. Rep. 294, 13 L. R. A. 598; *In re Walker's Estate*, 6 Pa. Co. Ct. Rep. 515; *Charles v. Byrd*, 29 S. Car. 544, 8 S. E. Rep. 1.

⁷⁹ *Co. Litt.* 46b; *Fulwood's Case*, 4 Coke, 65a.

⁸⁰ *Mackay v. Mackreth*, 4 Dougl. 213, 2 Chit. 461.

⁸¹ *Charles v. Byrd*, 29 S. C. 544, 8 S. E. Rep. 1, 4; 1 Wms. Ex. 464. Where a term of years is bequeathed to A. for his life and on his death to his heirs, or to the heirs of his body, the word "heirs" under the rule in *Shelly's* case is a word of limitation and not a word of purchase. A. under such circumstances takes the whole term as personal property and upon his death it devolves upon his personal representatives. If the rule in *Shelly's* has been abrogated by a statute as in most of the states or if from the language of the will it is clear that the testator, in disposing of the term

quit where such notice is required to be given before the lessor can bring ejectment.⁸² Where the defendant in ejectment alleges that notice to quit was not served on the representative he must show that there was a personal representative of the lessee on whom the notice to quit might have been served. It will not be presumed there was a personal representative as he can only exist by appointment by will or by the issuance of letters of administration. Hence until it be shown that there was an administrator of a tenant from year to year, service of a notice to quit upon his widow in possession of the premises is sufficient.⁸³

§ 38. **The expiration of the lease for years on the death of the lessee.** The general rule that a lease for years upon the death of the lessee devolves as personal property upon his personal representative is of course subject to an exception where the lease is expressly or by implication to terminate by operation of law on his death. If the lessee is the employee of the lessor and his occupation of the premises is a mere incident of the contract of hiring, the occupation will terminate with the death of the servant. The relationship of landlord and tenant under certain circumstances existing between a servant and his employer will therefore terminate on the death of the tenant. Thus, where a church had employed a pastor on a yearly salary together with the use by the pastor of the parsonage as a residence the relationship of landlord and tenant between the parties terminates at his death; and the right of occupancy by the pastor then ceasing, there is nothing to pass to his personal representative.⁸⁴ So, an exception to the general rule will be recognized where the lessee by the terms of the lease is bound to render service to the lessor about the demised premises which services are personal to the lessee and which no one besides him-

for years intended that "heirs" should operate as a word of purchase and not as a word of limitation, A., the ancestor, will take a life estate in the term and his heir a remainder as a purchaser. The personal representative of A. takes nothing. *Williams' Executors*, 678; *Fearne Contingent Rem.* 490; *Doe v. Lyde*, 1 T. R. 393; *Ex parte Sterne*, 6 Ves. 156.

⁸² *Roe on dem. of Shore v. Porter*, 3 T. R. 13; *James v. Dean*, 11 Ves. 393; *Rees v. Perrot*, 4 Car. & Payne, 230.

⁸³ *Rees v. Perrot*, 4 Car. & Payne, 230.

⁸⁴ *East Norway Lake N. E. Lutheran Church v. Froislie*, 37 Minn. 447, 35 N. W. 260.

self could render. The fact that a tenant of a farm is expressly bound by his lease to see that the land is well cultivated and is fertilized, that no waste is committed, that buildings and fences are kept in good repair and that certain houses are erected in particular places upon the land does not imply that his death shall terminate the term as these are services which any good tenant may perform, either himself or by others whom he may hire for the purpose.⁸⁵ The ordinary rule above stated does not apply to a lease to a firm or a partnership of a building which is owned by one of the partners for the purpose of carrying on the business of the partnership. Under such circumstances when, by reason of the death of any of the partners the partnership is dissolved, the term is at an end.⁸⁶ But where the agreement between the partners provides that the firm shall not be dissolved upon the death of one of the partners, but the personal representative of his estate is to be substituted for him, the rule that the death of a partner terminates the lease does not apply. This provision of the copartnership articles exempting them from the operation of the ordinary rule that the death of a partner dissolves the firm, being known to all the parties to the lease will be read as a part of it and as though written in it.⁸⁷

§ 39. **The liability of the personal representative of the deceased lessee of a term of years.** The personal representative of a lessee for years on the death of the lessee becomes an assignee of the term. But the executor of a lessee is not liable as assignee until he takes actual possession of the premises. After he takes actual possession he becomes liable for the rent.⁸⁸ In this respect his character and liability as an assignee or *quasi* assignee of the lessee differ very materially from those of an assignee by contract who is liable for the rent from the date of the assignment whether he takes the possession or not. By taking possession the personal representative becomes liable in his

⁸⁵ *Charles v. Byrd*, 29 S. Car. 544, 8 S. E. Rep. 1, 4.

⁸⁶ *Johnson v. Hartshorne*, 52 N. Y. 172, 177; *Doe v. Miles*, 1 Stark. 181; *Doe on d. Colnaghi v. Bluck*, 8 C. & P. 464, in which the partnership having been dissolved notice to quit was dispensed with.

⁸⁷ *In re Markle's Estate*, 17 Pa. Co. Ct. Rep. 337, 5 Pa. Dist. Rep. 47.

⁸⁸ *Ex parte Galloway*, 21 Wend. (N. Y.) 32; *Howard v. Heinerschit*, 16 Hun, 177. See, *Knickerbocker Life Insurance Co. v. Patterson*, 75 N. Y. 589.

representative capacity on the lessee's covenant to pay rent.⁸⁹ But the personal representative of a deceased lessee who takes possession of and occupies the premises which had been leased to the person whom he represents does not by this action render himself personally liable to the lessor for the rent subsequently accruing under the lease while he is in the occupation of the premises. He is liable personally only for the actual profits of the land or for so much as it is reasonably worth. And for that proportion of the rent payable under the lease which exceeds the profits he is liable only as in his representative capacity out of the estate.⁹⁰ In any case, however, his personal liability to the lessor does not exceed what the premises yield and he may show what the net profits are in a suit against him personally for the rent brought by the lessor. The law looks upon him as a *quasi* assignee and he is none the less an assignee because his personal responsibility is less than an assignee in fact.⁹¹ Where the personal representative is sued in his representative capacity on a lease which has been signed by his decedent the estate is liable according to the express covenants of contract entered into by the deceased and the representative cannot defend by showing the rental value of the premises is less than the rent agreed to be paid. Where an executor is sued personally as having entered

⁸⁹ The lessee's administrator who does not at once quit and surrender the leased premises on his appointment or on a notice to quit, but keeps the decedent's property on the premises for several weeks, and claims rent from an under-tenant which accrued after the death of his intestate will be presumed to have taken possession of the premises. He is personally liable to the lessor down to the date of the service of the notice to quit for the actual value of the use of the premises. *Inches v. Dickinson*, 7 Allen (Mass.) 71, 79 Am. Dec. 765.

⁹⁰ *Fisher v. Fisher*, 1 Bradf. Sur (N. Y.) 345; *In re Kemp's Estate*, 34 Pittsb. Leg. J. 82; *Rendall v.*

Andreae, 61 Law J. Q. B. 630; *Traylor v. Cabanne*, 8 Mo. App. 131; *Remnant v. Brembridge*, 2 Moore, 94; 8 Taunt. 191, 19 R. R. 495.

⁹¹ *Becker v. Walworth*, 45 Ohio St. 169, 172, 12 N. E. Rep. 1. The executor of a lessee cannot be made liable as assignee of a term without an entry and an actual taking possession by him of the demised premises; but, if he enter and take possession, he may be made liable as assignee, though, by proper pleading, he may limit such liability for rent to the yearly value which the premises might have yielded. *Rendall v. Andreae*, 61 Law J. Q. B. 630.

on, and being in possession of, the premises, or where he is sued as being the assignee of the term he may plead in defense that he is an executor, that he is without assets and that the premises are of less value than the yearly rent. These defenses must be specially alleged in the answer for the presumption is that the value of the premises is greater than the rent reserved and that he has received or is receiving enough from the land to pay the rent. The plea of the personal representative that the yearly value of the premises is less than the rent agreed to be paid where he is sued as executor and has entered as such will show that he is not personally liable by reason of any excess due from the estate but that as executor he is liable only for the amount he has actually received.⁹² The plea of an administrator that the premises were of less value than the arrears of rent and that he had paid all the profits he had received from them is not supported by evidence that the deceased had underlet them and that the administrator had been unable to collect the rent from the undertenant or by proof that the premises were out of repair, where the lease contained a covenant by the deceased to repair the premises.⁹³ The liability of an executor who takes possession under a lease to his testator on a covenant to repair, contained in the lease is usually personal. He may refuse to take possession but if he

⁹² *Traylor v. Cabanne*, 8 Mo. App. 131, 134; *In re Galloway*, 21 Wend. (N. Y.) 32; *Rubery v. Stevens*, 4 Barn. & Adol. 241; *Wollaston v. Hakewill*, 3 Man. & Gib. 297. The lessor has the right, when the executor of the lessee enters upon the premises to look for his rent either to the estate or to the executor personally. The remedies against the estate and against the executor are not inconsistent. The executor on entering upon the premises is in contemplation of law the assignee of the lease and can avoid personal liability for rent only by showing an express contract by the lessor to look to him as executor only or such conduct by the lessor as will preclude

him for enforcing a personal liability against him. The mere fact that receipts signed by the lessor acknowledged payments by the executor as such does not alone show that the lessor elected to hold him liable for the rent in that capacity only, where the receipts were given thus at the executor's request so that he might use them as vouchers in the probate court and when the insolvency of the estate was unknown to the lessor when he signed the receipts. *Becker v. Walworth*, 45 Ohio St. 169, 173, 12 N. E. Rep. 1.

⁹³ *Hornidge v. Wilson*, 3 P. & D. 641, 11 A. & E. 645; 9 L. J. Q. B. 72.

does so he must keep the premises in repair where the person under whose rights he claims was bound to do so. So while an executor who has occupied premises held by his testator under a lease with covenants to pay taxes and rent and to keep in repair is liable on the covenant to pay taxes and rents only so far as he has received profits, he is liable for the breach of the covenant to repair to the same extent as any other assignee.⁹⁴

§ 40. **The remedies of the personal representative of the lessee.** The personal representative of the lessee may usually sue to enforce any express covenant in the lease binding on the lessor. Thus, a personal representative of the lessee may sue to recover damages for trespass on the premises committed by the landlord or any other person before or after the death of the intestate,⁹⁵ or he may sue to recover the possession of a life estate.⁹⁶ So, too, the personal representative of the lessee may sue the landlord for damages resulting from a forcible entry by the landlord made at the death of the lessee.⁹⁷ The personal representative of the deceased lessee is entitled to the possession of the premises for the remainder of the term subject to his obligation to pay the landlord for the use of the same. The personal representative cannot, because he is entitled to the possession, make a parol surrender to the landlord of the unexpired term and take a lease to himself personally. The surrender being by parol would be invalid under the statute of frauds. It would also be set aside in equity as a violation of the duty which the representative owes to the estate. It need not be shown that the taking of the lease to himself personally would be beneficial to him, as that will be presumed and the law will not permit him to

⁹⁴ *Tremeere v. Morrison*, 4 M. & Scott, 603, 1 Bing. (N. C.) 89, 3 L. J. C. P. 260. "The general rule is, that the executor of a lessee is liable as an assignee, except that with respect to rent, his liability does not exceed what the property yields; no such exception applies to the covenant to repair." *Tremeere v. Morrison*, 1 Bing. N. C. 89.

⁹⁵ *Schee v. Wiseman*, 79 Ind. 389.

⁹⁶ *Cunningham v. Baxley*, 96 Ind. 367, 369; *Sutter v. Lackman*, 39 Mo. 41.

⁹⁷ *Smith v. Dodds*, 35 Ind. 452; construing 2 Gav. & H. St. P. 527. Where the testator at his death held land under a lease for a term of years his executor is the proper person to begin ejectment against a trespasser. *Duchane v. Goodtitle*, 1 Blackf. (Ind.) 117; *Mosher v. Yost*, 33 Barb. (N. Y.) 277.

obtain an advantage to himself at the expense of the estate which he represents.⁹⁸ A representative of the deceased lessee may execute a valid sub-lease for any period short of the term which devolves upon him by the death of the lessee. The rent which he collects from the sub-tenant is assets of the estate for the purpose of distribution among the next of kin.⁹⁹ While the executor may grant a sub-lease before letters testamentary are issued to him, an administrator cannot do so, nor can he assign the premises until he has received his letters. The authority of the administrator to sublet is derived from his letters of administration, while the authority of the executor is derived from the will in which he is appointed. The issuance of letters testamentary to the executor confirms all his acts done prior thereto.¹ Any damages which may be recovered against any person by a personal representative of the lessee are personal property of the estate and are assets in the hands of the personal representative to be applied to the paying of debts or to be distributed according to law.²

§ 41. **The rights of an executor of a lessor.** If in the lease the lessor reserve rent to himself by name in the case of a lease for years, the rent will be determined by the death of the lessor during the term. If, however, he shall reserve the rent generally without stating to whom it shall go it will go to his heirs on his death during the term, and in such case the law will make the distribution.³ If the lessor reserve rent to himself, his executor and assigns, and the lessee covenants to pay the executor, the lease survives the death of the lessor and the heirs and devisee may sue and recover the rent though it is expressly reserved to the executor. The rather technical character of these rules of the old common law have been modified in modern times. As a general principle rents which have accrued and become due and

⁹⁸ *Charles v. Byrd*, 29 S. Car. 544, 559, 8 S. E. Rep. 1.

⁹⁹ *Bacon's Abr.* tit. Lease, (I) 7; *Finch's Case*, 6 Coke, 67b; *Inches v. Dickinson*, 2 Allen (Mass.) 71, 78 Am. Dec. 765; *Bendall v. Summersett*, 2 W. Bl. 692; *Hudson v. Hudson*, 1 Ark. 400; *Wankford v. Wankford*, 1 Salkeld, 299, 301; *Broker v. Charters*, Cro. Eliz. 92.

¹ *Bank of Hamilton v. Dudley's Lessee*, 2 Pet. (U. S.) 492, 493.

² *Schee v. Wiseman*, 79 Ind. 389, 392.

³ *Co. Litt.* 47; *Plow.* 171; *Whitlock's Case*, 8 Co. 68, 71; *Sacherevell v. Frogott*, 2 Saund. 367; *Sury v. Brown*, Lutch, 99, 101; *Jaques v. Gould*, 4 Cush. (Mass.) 384, 387.

payable during the lifetime of the lessor, if he is the owner in fee simple of the land, go to his personal representative on his death and are assets in his hands for the payment of debts. It is not material whether the rents are reserved to the lessor alone or whether they are reserved to him and his executors.⁴ But rents accruing subsequently to the death of the lessor are an incident of the reversion and go to the heirs and devisees of the lessor at the death of the lessor. The personal representative of the deceased lessor has no title to, nor can he recover from the lessee rents which have accrued after the death of the person whom he represents.⁵ The fact that the will of the deceased lessor confers upon his executor a power of sale for the purpose of paying debts or legacies does not confer a power upon the executor to collect the rents which accrue after the death of the testator, or to use them as assets of the estate.⁶ For the power in the executor to sell is merely a power in trust and confers no estate in the land on him which entitles him to its possession, or which places him in the position of a landlord, as respects any tenant who may occupy the land. The power of sale is a mere naked power. The land devolves upon the heir or devisee of the lessor subject to be divested by the exercise of the power of sale. Until that takes place the heir or devisee may occupy the land

⁴ Wells v. Cowles, 4 Conn. 182; McDowell v. Hendrix, 67 Ind. 513; Ball v. First National Bank, 80 Ky. 501; Sohler v. Eldredge, 103 Mass. 345; Bloodworth v. Stevens, 51 Miss. 475.

⁵ Masterson v. Girard's Heirs, 10 Ala. 60; Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Foltz v. Prouse, 17 Ill. 487; Dorsett v. Gray, 98 Ind. 273, 275; Kidwell v. Kidwell, 84 Ind. 224; Crane v. Guthrie, 47 Iowa, 542; Shawhan v. Long, 26 Iowa, 488, 492, 96 Am. Dec. 164; Head v. Sutton, 31 Kan. 616, 3 Pac. Rep. 280; Eastin v. Hatchitt, 15 Ky. L. Rep. 780; Ball v. First Nat. Bank, 80 Ky. 501; Stinson v. Stinson, 38 Me. 593; Mills v. Merryman, 49 Me. 65; Getzandaffer v. Caylor, 38 Md.

280; Lobdell v. Hayes, 78 Mass. 236; Bloodworth v. Stevens, 51 Miss. 475; Shouse v. Krusor, 24 Mo. App. 279; Allen v. Van Houten, 19 N. J. L. 47; In re Spears, 89 Hun. 49, 35 N. Y. Sup. 35; Fay v. Holloran, 35 Barb. (N. Y.) 295; Fleming v. Chunn, 57 N. C. 422; Haslage v. Krugh, 25 Pa. St. 97; Adams v. Adams, 4 Watts (Pa.) 160; Huff v. Latimar, 33 S. C. 255, 11 S. E. Rep. 758; Smith v. Thomas, 82 Tenn. 324; Rowan v. Riley, 65 Tenn. (6 Baxt.) 67.

⁶ Clendenning v. Currier, 6 Gill & J. (Md.) 420; Greenland v. Waddell, 5 N. Y. St. Rep. 835; Watts' Estate, 168 Pa. St. 430, 433, 32 Atl. Rep. 26, 36 W. N. C. 372, 47 Am. St. Rep. 893.

himself or he may lease it to others, reserving and enjoying its rents and profits. This rule applies to a power of sale conferred by a statute upon the executor or other personal representative of a deceased lessor, for the purpose of paying the debts of the decedent.⁷ So also, an administrator of the deceased lessor cannot by a bill in equity have the rents which accrue and become payable after the death of his intestate from a creditor of the intestate, set off against a judgment obtained by the creditor, against the administrator. The reason of this is that the administrator has no rights in or to the real property or to the profits unless the estate is insolvent.⁸ The executor of the landlord may sue the tenant for damages caused by a breach of covenant by the tenant which happened during the life of the landlord.

⁷ *Lobdell v. Hayes*, 12 Gray (Mass.) 236; *Brooks v. Jacken*, 125 Mass. 307, 309.

⁸ *Bullock v. Sneed*, 13 Sm. & M. Miss. 293. "The probate court does not necessarily have any jurisdiction over the rents. The administrator neither has the right against the consent of the heirs, nor is he required, to occupy the estate or collect the rents therefrom. He may receive the income of the real estate by the request of the heirs, or with their acquiescence. He would not be regarded as a trespasser in so doing, unless done in opposition to their interests, or in defiance of their wishes. It is often convenient, and sometimes of decided advantage for him to do so; as where heirs are minors without guardians; or are of affairs abroad, or unacquainted with the management of affairs, and where the administrator may be himself an heir, or have intimate business or family relations with the estate and in other cases. In many cases, there is an understanding or agreement, that the administrator shall take the rents, and account for

them as assets for the benefit of the estate, where such a course may save the sale of the real estate for debts, or where the heirs get the advantage of them on the general distribution. In such case the administrator would account in the probate court for such rents with the general assets according to such agreement, but not necessarily by force of any requirements of the statute. Such we believe to be a somewhat common practice." By *Peters, J.*, in *Kimball v. Sumner*, 62 Me. 305, 310. In *Boynton v. Peterborough & Shirley R. Co.*, 4 Cush. (Mass.) 467, the court, by *Shaw, C. J.*, said: "The heir takes the estate according to the well-known rule of inheritance, at the time of the decease of the ancestor, subject only to be divested by a sale, pursuant to law, conducted in the manner prescribed by statute. All the legal consequences of this relation are held to follow. The heir is the owner until he is divested; he has the exclusive possession and right of possession; he may take the rents and profits to his own use and without account."

This rule applies to all covenants entered into by the tenant, unless the covenant is expressly in favor of the heir of the landlord, in which case, only the heir can sue; or unless the covenant is a mere personal contract, the benefit of which dies with the person of the landlord. This rule has been applied to breaches of a covenant to repair occurring during the life of the landlord.⁹

§ 42. **The liability of a personal representative for rents.**

If the personal representative of a deceased lessor takes possession of the lands of his decedent, and occupies them for his own use or leases them and retains the rents he must pay the heirs or devisees the rental value of the lands.¹⁰ They may recover the rents from him in an action at law,¹¹ and in equity he will be regarded as a trustee for the heirs and devisees to the extent of the money which came into his hands from the rents of the premises.¹² But where the personal representative is an heir of the decedent and he collects the rent it will be presumed that he collected it as an heir and he cannot be compelled to account for it to the next of kin.¹³ A personal representative who collects the rents has no right or duty to account for them to the next of kin in making up his account. He is not chargeable on his accounting but he is personally liable to the heirs at law for money received and in equity as a trustee for those who by law are entitled to receive the rents of the real property of the person he represents.¹⁴ If the personal property is insufficient to pay the

⁹ *Raymond v. Fitch*, 2 C. M. & R. 588; *Kingdon v. Nottle*, 1 M. & Sel. 355; *King v. Jones*, 5 Taunt. 518, 1 Marsh. 107; *Ricketts v. Weaver*, 12 M. & W. 718, 723, 13 L. J., Ex. 195.

¹⁰ *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590; *In re Misamore's Est.*, 90 Cal. 169, 27 Pac. Rep. 6; *In re Holderbaum's Est.*, 82 Iowa, 69, 72, 47 N. W. Rep. 898; *Stearns v. Stearns*, 1 Pick. (Mass.) 157; *Shuffler v. Turner*, 111 N. C. 297, 16 S. E. Rep. 417.

¹¹ *Brooks v. Jackson*, 125 Mass. 307, 309; *Gibson v. Farley*, 16 Mass. 280.

¹² *Autrey v. Autrey*, 94 Ga. 579,

20 S. E. Rep. 431; *Jones' Appeal*, 3 Grant Cases (Pa.) 250; *Robb's Appeal*, 41 Pa. St. 45.

¹³ *Schwartz' Estate*, 14 Pa. St. 42.

¹⁴ *Smith v. King*, 22 Ala. 558; *Goodrich v. Thompson*, 4 Day (Conn.) 215; *Eppinger v. Canepa*, 20 Fla. 262; *Hendrix v. Hendrix*, 65 Ind. 329, 331; *Evans v. Hardy*, 76 Ind. 527; *Head v. Sutton*, 31 Kan. 616, 3 Pac. Rep. 280; *Henderson's Succession*, 24 La. Ann. 435; *Lewis v. Carson*, 16 Mo. App. 342; *Lucy v. Lucy*, 55 N. H. 9, 10; *Griswold v. Chandler*, 5 N. W. 492; *Stagg v. Jackson*, 1 N. Y. 206; *Fisher v. Fisher*, 1 Bradf. (N. Y.)

debts, or if the estate is insolvent, the personal representative may sell the land for the purpose of paying debts; but until that time the heirs are entitled to receive the rents and profits, and the mere fact that the personal estate is insolvent does not authorize the administrator or executor to collect the rents.¹⁵ And an administrator who, without the consent of the widow of the deceased, leases land which had been assigned to her for her dower, will be liable to her personally for the rents which he has received under the lease.¹⁶

§ 43. **The power of an administrator to lease the lands of his intestate.** An administrator, as such, has ordinarily no power to execute leases of the real property of his intestate though where an administrator is permitted by the heir to lease land whether for the purpose of paying the debts of the deceased, or meeting the expenses of administration or for any other proper and legal purpose, the heir will be estopped from subsequently questioning the validity of the action of the administrator.¹⁷ For an administrator may, with the

355; *Campbell v. Johnson*, 1 Sandf. Ch. (N. Y.) 148; *Floyd v. Herring*, 64 N. C. 409; *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 462; *Carlisle's Appeal*, 38 Pa. St. 259; *McCoy v. Scott*, 2 Rawle (Pa.) 222; *Jewell v. Jewell*, 11 Rich. Eq. (S. C.) 296; *Stockwell v. Sargent*, 37 Vt. 16.

¹⁵ *Kimball v. Sumner*, 62 Me. 305; *Gibson v. Farley*, 16 Mass. 283; *Boynton v. Peterborough, etc., Co.*, 4 Cush. (Mass.) 467, 469; *Palmer v. Palmer*, 13 Gray (Mass.) 326; *Stearns v. Stearn*, 1 Pick. (Mass.) 157; *Newcomb v. Stebbins*, 99 Mass. 616, 617.

¹⁶ *Boyd v. Hunter*, 44 Ala. 705. A statute which requires an executor or an administrator who uses any part of the real estate, to account for the income of the same in the probate court means that he shall account for the rents only to such persons to whom they

belong. He must account for them to the heirs or devisees unless they expressly or by necessary implication agree that the rents shall be applied with other assets to pay the legacies, the debts and the expenses of administration. *Brooks v. Jackson*, 125 Mass. 307, 310. Where by a statute an administrator has power to rent the lands of his decedent it would seem reasonable that he should account for the rents received as assets and in a court of probate. See, *Bondurant v. Thompson*, 15 Ala. 202; *Smith v. King*, 22 Ala. 558.

¹⁷ *Crowder v. Shackelford*, 35 Miss. 320, 359; *Ashley v. Young*, 79 Miss. 129, 29 So. Rep. 822; *Stearns v. Stearns*, 1 Pick. (Mass.) 157; *Choate v. Arrington*, 116 Mass. 552; *Brent v. Chipley*, 104 Mo. App. 645, 78 S. W. Rep. 270. See, also, *Jackson v. O'Rorke* (Neb. 1904), 98 N. W. Rep. 1068.

knowledge of the heirs and without their dissent rent the lands of his intestate for the purpose of paying the debts of the estate and the rent is then assets in his hands for that purpose.¹⁸ In some states it is expressly provided by statute that an executor or administrator may rent or sell lands for the purpose of paying the debts of the deceased person whom he represents.¹⁹ Such a lease is not likely to be of much value or to meet with favorable consideration from a prospective tenant. It is in some cases provided that an administrator's lease shall be terminated with his office.^{19a} And in all cases where the execution of a lease by an administrator is in question it is very advisable, if not indispensable, for the protection of all parties, to secure the approval of the court having jurisdiction of the estates of decedents to the execution of the lease by the administrator.²⁰

§ 44. **The power of administrator with the will annexed to lease.** Inasmuch as a power to sell or to lease lands conferred upon an executor by the will is a special power in trust which indicates and is based upon some special trust or confidence which the testator had and reposed in the executor personally it is a general rule that such special testamentary power to sell or lease does not devolve on an administrator with the will annexed. So far as leasing the property of the testator is concerned the administrator with the will annexed has such powers only as are conferred upon an administrator by statute.²¹ In some of the states by express statute the administrator with the will annexed possesses and may exercise all powers which might have

¹⁸ *Ashley v. Young*, 79 Miss. 129, 29 So. Rep. 822.

¹⁹ *Palmer v. Stiner*, 68 Ala. 400.

^{19a} *Burbank v. Dyer*, 52 Ind. 392; *Smith v. Park*, 31 Minn. 70.

²⁰ *Bank v. Dudley*, 2 Pet. (U. S.) 492; *Roe v. Summerset*, 2 W. Bl. 692. See, also, *Brent v. Chipley*, 104 Mo. App. 645.

²¹ The following cases refer only to a power of sale conferred on the executor by the will but by analogy they would doubtless be applicable to a testamentary power to lease lands: *Lucas v. Price*, 4 Ala. 679; *Lockwood v. Stradley*, 1 Del. Ch. 298; *Harker v. Smith*, 7

Ga. 461; *Hall v. Irwin*, 7 Ill. 176; *Owens v. Cowan*, 7 B. Mon. (Ky.) 152; *Brown v. Hobson*, 3 A. K. Marsh. (Ky.) 380, 13 Am. Dec. 187; *Montgomery v. Milliken*, 9 Miss. 495; *Brush v. Young*, 28 N. J. L. 237; *Naundorf v. Schuman*, 41 N. J. Eq. 14, 2 Atl. 609; *Dominick v. Michael*, 4 Sandf. Ch. (N. Y.) 374; *Gilchrist v. Rea*, 9 Paige Ch. (N. Y.) 66; *Brain v. Mattison*, 54 N. Y. 663; *Dunning v. Ocean Bank*, 61 N. Y. 497; *Ferebee v. Proctor*, 2 Dev. & B. (N. C.) 439; *Moody v. Vandyke*, 4 Binn. (Pa.) 31; *Moody's Lessee v. Filmer*, 3 Grant Cas. (Pa.) 17.

been exercised by the executor including a power to sell the land of the testator.²²

§ 45. General rule as to the power of executors to make leases. As a general rule and speaking broadly, it may safely be said that in the absence of an express direction in the will creating in the executor some power over the real estate of his testator an executor has no interest in or control over the real property of the testator which will enable him to execute a valid lease of the same.²³ In Michigan it has been held that an executor's lease for two years of the real estate of his testator, which he has taken possession of and occupied with the consent of the heirs or devisees, though void as a lease for two years, under a statute allowing an executor to lease the real property of his testator "from year to year," is valid as a lease from year to year.²⁴ Inasmuch as the legal title to land undisposed of by will is in the heir alone an administrator cannot sue a tenant at will of his decedent for rent in the absence of any contract of renting between the administrator and the tenant.²⁵

§ 46. A lease which is executed by one of several executors or administrators. One of several executors having power to lease may execute a lease which will be valid and binding on all of them though by the will creating the power to lease the power is in express words conferred upon all the executors.²⁶ So, a

²² *Kidwell v. Brummagim*, 32 Cal. 436; *Dilworth v. Rice*, 48 Mo. 124; *Sandifer v. Grantham*, 62 Miss. 412; *Hester v. Hester*, 2 Ired. Eq. (N. C.) 330; *Creech v. Grainger*, 106 N. C. 213; 10 S. E. Rep. 1032; *In re Still's Estate*, 2 Pa. Dist. Rep. 105, 12 Pa. Co. Ct. Rep. 279, 31 W. N. C. 252.

²³ *Hankins v. Kimball*, 57 Ind. 42; *Rutherford's Heirs v. Clark's Heirs*, 4 Bush. (Ky.) 27; *Ely v. Scofield*, 35 Barb. (N. Y.) 330; *In re Hillard's Estate*, 8 Luzon Leg. Reg. (Pa.) 237; *Bruer v. Hayes*, 10 Ohio Dec. 583. The rule of the text has been modified by statute in some states. Thus where by a statute the personal representa-

tive has the power to rent or to sell the lands for the purpose of paying the debts of the deceased and where in the exercise of this power he claims the rents which have accrued after the death of the decedent he may recover the same as his title to the rents is the same as to any other chose in action. *Palmer v. Steiner*, 68 Ala. 400.

²⁴ *Grady v. Warrell*, 105 Mich. 310, 63 N. W. Rep. 204.

²⁵ *Cummings v. Watson*, 149 Mass. 262, 21 N. E. Rep. 365. And compare, *Howard v. Patrick*, 38 Mich. 795.

²⁶ *Chandler v. Ryder*, 102 Mass. 268; *Bunner v. Storm*, 1 Sandf.

lease for years may be assigned by one of several administrators so as to bind the others.²⁷ But where by a statute the majority of several executors named must join in the execution of a contract a lease signed by one is not valid as to the others. Nor can such a lease signed by one of two or more executors be regarded as binding on the others upon any presumption that the executor who signed acted as their agent when its term exceeds one year and the statute requires that the authority of an agent to make a lease for more than one year shall be in writing.²⁸ The rule is that where a term for years is specifically bequeathed it will on the death of the testator vest in the executor for the purposes of administering the estate. The legatee will acquire title through the executor and not directly from the testator. The legatee has no right to enter or to demand or receive the rents until the executor has given his assent to the bequest or has accounted and turned the term over to the legatee. Hence a person who proposes to take an assignment of the lease from the executor or to whom the executor proposes to sublet ought to ascertain whether or not the latter has assented to the bequest for if he has his power over the term is at an end. The legatee must be consulted and if he does not agree to the new tenant or assignee he may eject him by judicial proceedings.²⁹

§ 47. **A lease by an executrix being a feme sole.** At the common law the power of a *feme sole* who was also an executrix to lease a term as a *feme sole* is terminated by her marriage and thereafter her husband must be the lessor in all leases which she desires to make in her representative capacity.³⁰ Whether she

Ch. (N. Y.) 387; Ogden v. Smith, 2 Paige Ch. (N. Y.) 195; Doe v. Hayes, 7 Taunt. 222; Simpson v. Gutteridge, 1 Madd. 609, 617 (assignment of a lease); Hayes v. Sturges, 7 Taunt. 217. It is a very old and well recognized rule of the common law that a release, surrender of a term, the confession of a judgment, an attornment of one executor and any other lawful act which all the executors may lawfully do, will be binding and conclusive on all

when done by one only without the concurrence or knowledge of the others. The rule is different as to the torts of one executor and as to acts of the executors which could not lawfully be done by all.

²⁷ Lewis v. Ringo, 3 A. K. Marsh. (Ky.) 247.

²⁸ Utah Loan & Trust Company v. Garbutt, 6 Utah, 342, 23 Pac. 758.

²⁹ Doe v. Guy, 4 Esp. 154; Johnson v. Warwick, 17 C. B. 516, Fenton v. Clegg, 9 Ex. 680.

³⁰ Arnold v. Bidgood, Cro. Jac.

joins with him or not in the execution of the instrument does not affect its validity at the common law.³¹

§ 48. **The equitable jurisdiction over leases made by executors.** Leases which have been made by the personal representative though they be valid in law, may, under some circumstances, be set aside in equity on the application of interested parties. In order that a lease made by an executor may be valid, it must appear that the lease was made by him in order to secure a due and proper administration of the property of the deceased person whom he represents. Hence, if a lease is made by the personal representative which is clearly improvident and unprofitable to the persons who take the estate of the deceased it may be annulled in equity on application of the persons who have been prejudiced by the action of the personal representative in making the lease.³² If the lessee is not responsible for the waste committed by the personal representative, and particularly, where he had entered upon the premises and made improvements, equity may decree that he should receive compensation so far as the next of kin were benefited by what he had contributed. So, also, if a lease made by a personal representative is tainted with fraud on his part to the prejudice of the beneficiaries of the estate, the latter may have it set aside in equity.³³ So, generally if a sale of the land of the decedent be necessary to enable the personal representative to pay legacies and debts of the estate, or, if under all the circumstances a sale is more beneficial to the legatees than a lease, the latter, when made by a personal representative, may be set aside in equity and a sale may be ordered.³⁴

§ 48a. **The power of trustees to grant leases.** A trustee in whom is vested the legal estate may grant leases for reasonable times and at reasonable rents where the term of the lease does not exceed the duration of the legal estate in the trustee.³⁵ In

318; *Levick v. Coppin*, 2 W. Bl. 801.

³¹ *Levick v. Copin*, 2 W. Bl. 801; 1 Platt on Leases, 368; Woodfall, Landlord and Tenant, 51, 52.

³² *Margrave v. Archibold*, 1 Dow P. C. 107.

³³ *Keating v. Keating*, *Loyd v. Gov. Co. temp. Sugd.* 613.

³⁴ *Drohan v. Drohan*, 1 Ball & B. 185.

³⁵ *Hutcheson v. Bennetfield* (Ga. 1902), 42 S. E. Rep. 422; *Geer v. Traders' Bank*, 132 Mich. 215, 93 N. W. Rep. 437, 9 Det. Leg. N. 578.

some states the permission of the court is required before the trustee can lease property. For example, in the state of New York by statute a trustee may lease real estate during the life of the beneficiary for a term not to exceed five years without application to the court but if a term exceed that limit he must secure the permission of the supreme court.³⁶ As a general rule a trustee has no power to make a lease which was extended beyond the term of his trust.³⁷ A trustee, unless expressly authorized to do so by the person who has created the trust has no power to make leases extending beyond the term of the trust. If the trust estate is terminated by the death of the beneficiary or by his marriage or by his attainment of his majority or by the happening of any event which has been designated by the creator of the trust as working its termination the lease becomes *ipso facto* void.³⁸ If the rule were otherwise it would be possible for a trustee by granting long leases, or by making leases with covenants of renewal, to deprive the person on whom the legal title will devolve at the termination and expiration of the trust term of the possession and beneficial enjoyment of the property. The person in whom the legal interest would devolve would take it encumbered with outstanding leases and have tenants thrust upon him without his choice whom he could by no means get rid of until the termination of their terms. The same rule would apply where the trust instrument provides that on the happening of the event which terminates the trust the trustees shall convey the trust estate to a person designated. A lease entered into by the trustee during the existence of the trust does not last until the estate is in fact conveyed. It terminates at the same instant as the trust estate and a formal conveyance of the trust estate by the trustee is unnecessary and is usually dispensed with.³⁹ Very often powers to lease in express language are inserted in trust deeds or in wills creating trusts. And where there is a power to grant leases for twenty years a lease by the trustee for any period short of the twenty years is

³⁶ Weir v. Barker, 93 N. Y. Supp. 742.

³⁷ In re Armory Board. 29 Misc. 174, 60 N. Y. Supp. 882, 94 N. Y. St. Rep. 882, 30 Civ. Pro. Rep.

³⁸ Gomez v. Gomez, 81 Hun, 566,

31 N. Y. Supp. 206, 208; In re McCaffrey, 50 Hun, 371, 3 N. Y. Sup. 96.

³⁹ Watkins v. Reynolds, 123 N. Y. 211, 25 N. E. Rep. 322.

valid.⁴⁰ So, a power to lease for any time not to exceed twenty-one years will authorize a lease for twenty-one years which is determinable at the option of the lessee at the expiration of a less number of years.⁴¹ To state the rule concisely any lease by a trustee for a term which is less than the term permitted to be made by a power vested in him is valid though it may exceed the duration of the trust. But the power to lease for twenty-one years or to make building, and repairing leases for sixty-one years will authorize a lease for forty years containing the usual covenant by a tenant to repair.⁴²

§ 48b. **The proper covenants in leases by trustees.** In the absence of any instructions contained in the instrument creating the trust prescribing what conditions or covenants shall be inserted in the lease, any covenants may be inserted in leases by trustees which are consistent with the general intention of the creator of the trust and which do not prejudice the interest of the beneficiary or of the person who takes the legal interest after the trust has terminated.⁴³ There ought, however, always to be a covenant by the lessee to pay the rent. If this be not inserted an assignment of the lease by him will prevent the collection of rent in case the term created by the lease shall extend beyond the term of the trust. There ought always to be a covenant providing for a re-entry upon the breach of a condition by the lessee so that the remainderman may be protected as well as the trustee. A trustee cannot, unless expressly authorized to do so by the terms of the trust insert covenants of renewal in the lease. His covenants for a renewal though perhaps binding on him during the trust term will not bind those who take the property after the expiration of the trust.⁴⁴ The trustee will him-

⁴⁰ *Isherwood v. Oldknow*, 3 M. & S. 382.

⁴¹ *Edwards v. Milbank*, 4 Drew. 606, 29 L. J. Ch. 45.

⁴² *Easton v. Pratt*, 2 H. & C. 676. In a case where the circumstances of the property, its location and the conditions surrounding the estate generally, were such that a court of equity could see that the interest of the beneficiary of the trust would be favored by permit-

ting trustees to lease, it was held that the trustees might execute a lease for a much longer term than the period during which the trust would exist. *Marsh v. Reed*, 184 Ill. 263, 56 N. E. Rep. 306, affirming 64 Ill. App. 535.

⁴³ *Goodtitle v. Finucan*, 12 Doug. 575.

⁴⁴ *Gomez v. Gomez*, 31 N. Y. Supp. 206, 81 Hun, 566.

self be personally liable on the covenant for quiet enjoyment.⁴⁵ A trustee whose sole power is to receive the rents and profits, sell the land and invest the proceeds has no power to lease.⁴⁶

§ 48c. **Signature by one of two or more trustees.** A lease for a term of years signed by one only of several trustees in whom the title to the property is vested is invalid. Such a lease is an important and material act where the making of it was essential to carry out the trust contained in the instrument under which the trustees were appointed and inasmuch as it required an exercise of judgment and discretion should have been participated in by all the trustees. The signature of one trustee does not bind the others nor will there arise an implication of agency in the case of trustees which might perhaps be recognized in the case of joint tenants or partners. Doubtless one of several trustees may under some circumstances, be entrusted by his associates with the business of the trust as their agent. This rule, however, will not apply to such acts as a trustee ought to assume the responsibility for and which properly require a deliberate exercise of the will and judgment of all of them. Nor will a lease which is invalid because not signed by all the trustees become valid by the acquiescence or subsequent recognition of its existence by the other trustees who have not signed it. The trustees may sign at different dates and the lease will bind all as soon as all have signed. But until all have signed it is no lease and if it purports to lease a term of years it will be invalid under the statute of frauds. This being the case, mere silence or recognition will not validate it for it is, at most, only a lease at will where the lessee has gone into possession.⁴⁷

§ 48d. **The personal liability of the trustee.** The instrument of lease will not be invalidated merely because it does not refer to the power though it is always fitting and advisable that it should do so. In case the right to grant a lease of the character in question does not exist by reason of any interest which the lessor may possess aside from the power the intention will be

⁴⁵ *Chestnut v. Tyson*, 105 Ala. 149, 16 So. Rep. 723.

⁴⁶ *In re Hoysradt*, 45 N. Y. Supp. 841, 20 Misc. 265, 79 N. Y. St. Rep. 841.

⁴⁷ *Winslow v. Baltimore & Ohio Railroad*, 188 U. S. 646, 23 S. Ct. 443, 47 Law. ed. 635, reversing 18 App. D. C. 438.

presumed to execute the power on his part.⁴⁸ If the lessor has an interest and estate in the land as well as a power and the instrument does not clearly indicate whether he means to make the lease by virtue of his estate or by virtue of his power and it is immaterial whether the lease shall operate by the power or by the estate of the lessor it will then be presumed that the lessor intends not to execute the power but to grant the lease out of his own estate or interest. If, however, a lease created by a lessor who has both an estate and a power will be invalid if referred to an intention to grant a lease out of the estate and valid if referred to an intention on his part to execute the power it will be by implication referred to an intention to execute a lease under the power and not under the estate or interest. Trustees who execute a lease in their individual names, and in the body of the lease covenant to pay the rent without using any language showing an intention to bind the beneficiary, are liable personally on the covenant to pay rent although in the caption of the lease they are described as "trustees of" an organization mentioned. The word trustees is merely *descriptio personarum* and the court will not receive parol evidence to show the intent of the parties.⁴⁹

⁴⁸ Pitcher v. Daniel, 12 Rich. (S. Car.) Eq. 349.

⁴⁹ Stobie v. Dills, 62 Ill. 432, 438.

CHAPTER II.

CORPORATION LEASES.

- § 49. The common law power of corporations to grant leases.
- 50. The common law rule as to the power of a corporation to become a lessee.
- 51. The form of corporation leases.
- 52. The necessity for seal on a corporation lease.
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- 56. The effect of the dissolution of a corporation upon an existing lease.
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§ 49. The common law power of corporations to grant leases.

At the common law a private corporation which by express grant or by necessary implication has power to own and control real estate may grant leases thereof and receive and use the rents of the same in all cases where the granting of the lease is proper or necessary to enable the corporation to carry on its business, or to carry out the purposes and object of the corporation.¹ The power and capacity of the corporation in this respect are the same as though it were an individual. It is usually advisable to ascertain if the corporation has charter power to

¹ Phillips v. Aurora Lodge, 87 Ind. 505; Dubuque v. Miller, 11 Iowa, 558; Crescent City Wharf, etc., Co. v. Simpson, 77 Cal. 286, 19 Pac. Rep. 426; New Orleans v. Guillette, 14 La. Ann. 875; Phillips v. Eastern Railway, 138 Mass. 122; Taylor v. Carondelet, 22 Mo. 205; State v. Flavell, 24 N. J. Law, 370; Nicoll v. N. Y. Cent. R. R. Co., 12 N. Y. 121; Matthews v. Mayor,

etc., 14 Abb. Pr. (N.Y.) 209; Denike v. N. Y. & Rosedale Co., 80 N. Y. 599; Rives v. Dudley, 3 Jones (N. C.) Law, 126; Baltimore, etc., Co. v. McCutcheon, 13 Pa. St. 1; Co. Litt. 44a; Attorney General v. Moses, 2 Madd. 308; Spendlomes v. Burkitt, Hob. 7; Bunny v. Wright, 1 Leon, 59; Featherstonhaugh v. Lee, M. P. Co., L. R. 1 Eq. 318.

lease. But it is not always necessary that an express authority to lease the real estate of a corporation shall be conferred upon it by its articles of incorporation. The circumstances of the particular case may be such that a lease will be valid without express charter authority. For if a corporation is in such a condition that it cannot continue its operations successfully, and is in failing financial circumstances, it may lawfully lease its entire property, though it may not be expressly authorized to do so.² So also the trustees of a corporation who by its charter are vested with the control of its property may lease the same as an assembly room when the premises are not being used by the corporation itself.³ But a lease which by its operation suspends the ordinary business of the corporation may be absolutely void and is unquestionably so where a statute provides that the suspension of the business of the corporation for a specific period shall work a forfeiture of all the rights, privileges and franchises of the corporation.⁴

§ 50. **The common law rule as to the power of a corporation to become a lessee.** It is undisputed that a corporation whether lay or ecclesiastical, aggregate or sole, at the common law possessed the implied power to take and hold real property under a lease from its owner so far as it is necessary to do so to carry out the purposes for which it was incorporated. The right to hire premises which are necessary to the carrying on of the business of the corporation is a power which is inherent to every corporation. So thoroughly is this recognized that the question is hardly ever raised.⁵ If a corporation has actually used and occupied land as a lessee which is necessary for its business, and

² As to the statutory power of a water company to lease its premises to another water company see *Moore v. Charters Valley Water Co.*, 216 Pa. St. 467. 65 Atl. Rep. 936.

³ *Phillips v. Aurora Lodge*, 1 O. G. T., 87 Ind. 505.

⁴ *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27. In construing an express statutory power conferred upon a corporation to lease its property to a company "in this state or otherwise" it has

been held that a lease to a corporation in another state was valid. *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130. The charter power to erect and maintain docks confers by implication the power to lease such docks after their erection. *Smith v. Berndt*, 1 N. Y. Supp. 108.

⁵ *Blanchard v. Warner*, 1 Blatch. (U. S.) 258; *Jesus College v. Gibbs*, 1 Y. & C. 145; *Lowe v. London R. R. Co.*, 14 Eng. L. & E. R. 19.

which has been occupied for the carrying on of the corporation business, with the consent of the owner it may be sued in assumpsit for use and occupation.⁶ An express power vested in a corporation by its charter to hire premises for corporation purposes by implication vests in it all powers which are necessarily incidental thereto and which are required to render the possession and occupation of the premises beneficial to the corporation. The corporation would therefore enjoy the incidental power to enter into the usual covenants in a lease as, for example, the covenant to repair even though it would thereby become liable to rebuild in case of the destruction of the premises by fire.⁷ So, too, the power of a corporation to lease land from the owner includes by implication the incidental power to agree to pay a specific sum of money for rent or to pay such a sum as arbitrators may agree upon.⁸ A corporation which, as a lessee of land, has entered and occupied the same cannot defend an action for rent or for use and occupation on the ground that it is not a corporation *de jure*. It is sufficient so far as the landlord's rights are concerned that it is a corporation *de facto* while he, on the other hand, is estopped to repudiate his obligations under the lease upon the ground that the corporation has no legal existence where he has recognized and dealt with it as a corporation.⁹ The plaintiff in an action for rent is relieved from proving the existence of a corporation in answer to a plea of *nul tiel corporation* where it appears that there has been the execution and delivery of a valid lease by the landlord to the corporation. The existence of a lease or other writing in which the corporation is described in its corporate capacity, executed and delivered to the corporation is *prima facie* proof of the existence of the corporation.¹⁰

§ 51. **The form of corporation leases.** Aside from the necessity for a seal, no particular form is requisite to be followed in the execution of a lease by a corporation. No different language

⁶ *Lowe v. London R. R. Co.*, 14 Eng. L. & E. Rep. 19. There can be no question that a corporation may become a tenant from year to year. *Crawford v. Longstreet*, 43 N. J. Law, 325.

⁷ *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

⁸ *The Alexandria Canal Co. v. Swann*, 5 How. (46 U. S.) 83, 12 Law. ed. 60.

⁹ *Whitford v. Laidler*, 94 N. Y. 145, 151, 46 Am. Rep. 151.

¹⁰ *West Side Auction House Co. v. Connecticut, etc., Ins. Co.*, 186 Ill. 158, 57 N. E. Rep. 839.

is required from that used in cases where the parties are natural persons.¹¹ The lease to bind the corporation either as lessee or lessor must be in its form the instrument of the corporation and not of its individual officer or agent. It may not always be necessary that the signature of the lease shall be technically the signature of the corporation, though that is always advisable. If from the body of the lease it is clearly apparent that the corporation is intended to be bound, and particularly if the corporation being the lessor shall have permitted the lessee to go into possession and to pay rent, it cannot repudiate the instrument because it has not subscribed to it the name of the corporation or because it is not sealed with its corporate seal. Hence where the agent of a corporation had made a contract agreeing to give a person a lease; and the corporation had permitted the latter to enter and had received the rent from him it is bound to give him a lease and cannot refuse to do so upon the ground that the contract was not sealed and signed by the corporation.¹²

§ 52. **The necessity for a seal on a corporation lease.** By the ancient common law it was a rule that a corporation could transfer or grant its real property, and in fact, could make a contract of any description only under its corporate seal. This doctrine, however, that a corporation can contract only under its corporate seal is now universally repudiated.¹³ Such a rule based as it was upon the almost superstitious reverence which the early common law tribunals in England entertained for a seal could only be tolerated when corporations were not numerous. As soon therefore as the increase in commercial enterprise brought about the formation of large companies by which the capital of numerous individuals was combined in the form of corporate capital to carry on the increasing trade of the community the rule was entirely abrogated. The modern rule is that all corporations,

¹¹ Poole v. Bentley, 12 East, 168; Morgan v. Powell, 7 Man. & G. 389.

¹² Conant v. Bellows Falls Canal Co., 29 Vt. 263.

¹³ Sustaining the common law rule see Rochester v. Pierce, 1 Camp. 466; Rex v. Chipping Norton, 5 East, 239; Bridge Company v. Side, 2 C. & P. 371; Car-

ter v. Ely, 7 Sim. 211; Canal Co. v. Wilmot, 9 East, 360; Macbean v. Irvine, 4 Bibb (Ky.) 17; Long v. Madison & Flax Co., 1 A. K. Marsh. 105; Frankfort Bank v. Anderson, 3 A. K. Marsh. (Ky.) 1; In re Cape Sable Co., 3 Bland (Md.) 606.

in the absence of a restraining statute, may make all contracts which are within the scope of their general powers without the use of a corporate seal. Applying this general rule to the subject under discussion, it follows that the lease must be one which the corporation has a right to make, under its charter or under the statute law of the state in order to carry out the purpose of its creation. And the effect of the modern repudiation of the ancient rule is only to place a corporation upon an equality with the individual so far as the necessity for a seal is concerned. If a contract when executed by an individual must be under seal in order to possess validity the same contract when executed by a corporation must also be under seal.¹⁴

§ 53. **By what officer corporation lease should be executed.** Until the contrary appears it may safely be presumed upon the general principles of the law of corporation contracts that the president of a corporation has power to lease the lands of the corporation.¹⁵ The leasing of land on his part where the corporation has power to own land, is so manifestly for the benefit of the corporation and seemingly so far an incident of his general powers as its president that it will require some affirmative proof

¹⁴ *Shropshire v. Behrens*, 77 Tex. 275, 13 S. W. Rep. 1043. The modern rule that a corporation may contract without seal as applicable to contracts generally is sustained by the following cases: *Curry v. Bank*, 8 Port. (Ala.) 360; *McKiernan v. Lenzen*, 56 Cal. 61; *Dennis v. Maynard*, 15 Ill. 457; *Northeastern F. Ins. Co. v. Schetter*, 38 Ill 166; *B. S. Green Co. v. Blodgett*, 55 Ill. App 556; *Christian Church of Wolcott v. Johnson*, 53 Ind. 273; *Ring v. Johnson County*, 6 Iowa, 265; *Lathrop v. Commercial Bank*, 8 Dana. (Ky.) 114, 33 Am. Dec. 481; *Kennedy v. Baltimore Insurance Co.*, 3 Har. & J. (Md.) 367, 6 Am. Dec. 499; *Petrie v. Wright*, 14 Miss. 647; *Buckley v. Briggs*, 30 Mo. 452; *Teitig v. Boesman*, 12 Mont. 404, 31 Pac. Rep. 371; *Brady v. City of Brook-*

lyn, 1 Barb. (N. Y.) 584; *Gates v. Home M. L. Ins. Co.*, 4 Am. Law Rev. 395; *Thew v. Porcelain Mfg. Co.*, 5 Rich (S. C.) 415; *Fowler v. Bell* (Tex. 1896), 35 S. W. Rep. 822; *Ford v. Hill*, 92 Wis. 188, 66 N. W. Rep. 115; *Bank of Virginia v. Poitiaux*, 3 Rand. (Va.) 136. In *Crawford v. Longstreet*, 43 N. J. Law, 325, a lease for years by a corporation not sealed was held valid.

¹⁵ *Baltimore & P. Steamboat Co. v. McCutcheon*, 13 Pa. St. 13. See, also, as sustaining the general rule *Boston Tailoring Co. v. Fisher*, 59 Ill. App. 400; *Savings Bank of Cincinnati v. Benton*, 2 Met. (Ky.) 240; *Northern Cent. Ry. Co. v. Bastian*, 15 Md. 494; *Potter v. New York Infant Asylum*, 44 Hun (N. Y.) 367.

to show he has not the power. But where, by the charter of the corporation, the power to lease is vested exclusively in the board of directors a court of equity may enjoin a lessee from entering upon the possession of corporate real estate under a lease made by the president of the corporation without the authority and consent of the board of directors.¹⁶ The general manager of a corporation will, unless it is proved that the other contracting parties had knowledge of the limitation of his authority be presumed to have authority to lease land which is owned by the corporation.¹⁷ This rule is based on the principle of estoppel. A corporation which permits its general manager or any other official to deal with the public as its general agent, as for example, in buying and selling its real or personal property, and in hiring and discharging its employes, will be estopped, as against a lessee of premises owned by the corporation, to assert that the powers of the general manager to act for the corporation in leasing land were restricted by orders emanating from its directors.¹⁸ In all cases one who takes a lease of land owned by a corporation should make diligent inquiries as to authority of the agent with whom he is dealing. It has been held in one case that the agent or other officer making the lease must have express authority to do so and that individual directors cannot bind a corporation by a lease.¹⁹ A lease may be binding on a corporation when made by an agent without express authority and at the same time the lease may not be enforced by the corporation. So, a corporation cannot enforce a lease made by its agent without the authority of its board of directors.²⁰

§ 54. **The period for which a corporation lease may run.** At the common law a corporation owning the fee simple of land may lease it for any term of years however long. If by statute or at common law a corporation has power to lease its property and franchises the fact that the lease is for so long a time as to practically constitute a lease of the property in fee does not, as between the parties of the lease, effect its validity.²¹ Nor will

¹⁶ *Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 224.

¹⁷ *Singer Mfg. Co. v. Malean*, 105 Ala. 316, 16 So. Rep. 913.

¹⁸ *Phillips & Buttorff Mfg. Co. v. Whitney*, 109 Ala. 645, 20 So. Rep. 333.

¹⁹ *Hartford Iron Mfg. Co. v. Cambria Min. Co.*, 80 Mich. 491.

²⁰ *Berlin v. Belle Isle Scenic Ry. Co.*, 12 Det. Leg. N. 573, 105 N. W. Rep. 130.

²¹ *Dickinson v. Consolidated Traction Co.*, 119 Fed. Rep. 817.

a court of equity annul a lease for a very long term made by a corporation on the application of a minority stockholder, if the action of the corporation in making the lease was approved by the majority of the stockholders, unless it can be shown that the making of the lease was procured by fraud, or that its execution was detrimental to the interest of the corporation.²² The mere fact of the length of the term of the lease will not alone be considered as ground for annulling the lease. The fact that the lease extended beyond the term of the life of the corporation does not invalidate it. The lease is valid during the corporate life of the corporation. If by statute the corporate existence can be extended the lease may also be valid for such period as the life of the corporation is extended.²³ A lease to a corporation which is to extend beyond the period of the existence of the corporation as limited by its charter is not void for that reason. Such a case is analogous to that for a time certain if the lessee shall live so long. Thus a lease to a corporation for nine hundred and ninety-nine years is valid though the corporation is to expire in forty years particularly where it is binding on the corporation and its successors and in the charter provisions are made for a renewal of the charter by the state legislature.²⁴ By statutory enactment of the Congress the charter of a national bank may be extended upon the expiration of its corporate existence almost as a matter of course. It may readily be assumed from this statute that a national bank is not limited in the making of leases of premises for banking purposes to terms which shall be limited by the corporate existence of the bank.²⁵ The lease of premises entered into by a national bank as lessee for the sole purpose of transacting its banking business is not invalid though the term shall extend beyond the period of the life of the bank under its charter. Accordingly it has been held that a lease to a national bank of premises for a term of ninety-nine years is valid.²⁶ The fact that a lease of property to a corporation runs to its

²² *Dickinson v. Consolidated Traction Co.*, 119 Fed. Rep. 871.

309, 329, 2 C. C. A. 174, 10 U. S. App. 98.

²³ *Hill v. Atlantic & N. C. R. Co.*, 143 N. Car. 539, 55 S. E. 854, 864; *Tate v. Neary*, 65 N. Y. Supp. 40.

²⁵ *Weeks v. International Trust Co.*, 125 Fed. Rep. 370, 374, 60 C. C. A. 236; reversing 116 Fed. Rep. 898.

²⁴ *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. Rep.

²⁶ *Brown v. Schleier*, 118 Fed. Rep. 981, 984, 55 C. C. A. 475, 478.

assignees or successors may avoid an objection that its term does not expire until after the existence of the corporation is at an end. And it is not material if the lease under such circumstances is assignable, that it is assignable only with the consent of the lessor. Thus a national bank may validly lease a building for its own occupancy for a term extending beyond its existence though the lease is assignable only upon the assent of the landlord.²⁷

§ 55. When leases are *ultra vires*. A lease, like any other contract of a corporation, may under certain circumstances be *ultra vires*. In determining whether a lease is *ultra vires* it should be borne in mind that a corporation has no powers except such as are expressly given to it by and in its charter, or which are incident and necessary to its corporate existence. It will be presumed to possess such powers as are necessary to enable it to carry into effect the express powers conferred upon it by its charter. Corporations have almost universally the express power to own real property conferred upon them by charter; and, where this is the case, the act of the corporation in leasing lands owned by it cannot be *ultra vires* as the leasing of land is an inseparable incident of their ownership and necessary to the full enjoyment of such ownership for otherwise the owner will be absolutely prevented, unless he is able to cultivate or otherwise occupy the land himself, from deriving any profit from his ownership. In regard to corporations leasing their lands, the general principle should always be kept in mind by the lessee that persons dealing with corporations are chargeable with notice of the limitations imposed upon them by the terms of their charters. The lessee ought to employ care to see to it that the provisions of the charter, if any there be, regulating the leasing of the property of the corporation with which he is dealing are being complied with. But where he acts in good faith in entering into the lease, and he is permitted to enter into possession and to pay rent to the corporation, it will be estopped to plead subsequently that it acted *ultra vires* in making the lease. Accordingly a lease made by a company is not *ultra vires* merely because it did not receive the approval of the company as provided for by the charter. The fact that the lessee under such

²⁷ Weeks v. International Trust Co., 125 Fed. Rep. 370, 374; reversing 116 Fed. Rep. 898.

a lease entered into possession and began working the land and with the permission of the lessor was permitted to do so for more than three months estops the lessor.²⁸ A corporation having by its charter the power to brew, and to sell beer and to lease premises for that purpose has power to lease a saloon for the purpose of selling its own beer.²⁹ And the fact that after taking a lease itself of premises for that purpose it sublets them to another for the same purpose will not avail the corporation to plead *ultra vires*.³⁰ So, the lease of premises by a company which has charter power to buy and sell lager beer is not invalid because a portion of the premises is used for saloon purposes.³¹ So also, a corporation which has charter power "to carry on a general brewing and malting business and to manufacture and sell soda water" may execute a valid lease of premises "to be occupied for a saloon and for no other purpose." A lease for saloon purposes would be by implication within the power of the corporation.³² It is usually held that a corporation which purposes to act as a lessor cannot by its action disable itself from performing the purpose for which it was created. If the purpose of the occupation by the tenant is similar to that for which the corporation which is the lessor was incorporated there can be no question of the validity of the lease. Thus, a corporation which has been created to bore for oil may lease its land to a person who intends to take the oil from it, upon a royalty to be paid to the lessor. The lease is not an abandonment by the corporation of the purpose for which it was created.³³ So also, a corporation organized for literary and scientific purposes may lease a portion of its building for theatrical and similar purposes. A national bank has implied power under its charter to

²⁸ Equator Min., etc., Co. v. Guanella, 18 Colo. 548, 33 Pac. Rep. 613.

²⁹ Welsh v. Ferd. Herm Brewing Co., 47 Mo. App. 608.

³⁰ Welsh v. Ferd. Herm Brewing Co., 47 Mo. App. 608.

³¹ Keeley Brewing Co. v. Mason, 116 Ill. App. 603.

³² Brewer, etc., Brewing Co. v. Boddie, 181 Ill. 622, 55 N. E. Rep. 49.

³³ Starke v. J. M. Guffey, Petroleum Co. (Tex. 1905), 36 S. W. Rep. 1, affirming 80 S. W. Rep. 1080.

³⁴ Catholic Institute v. Gibbons, 7 Dec. Re. 576, 3 Bull, 581, affirmed in Gibbons v. Catholic Institute, 7 Dec. Re. 548, 3 Bull, 887; Gibbons v. Catholic Institute, 34 Ohio St. 239.

erect office buildings for its own use and to rent out offices in them so far as the renting of offices does not constitute an abandonment of the purpose for which the bank was incorporated.³⁵

§ 56. **The effect of the dissolution of a corporation upon an existing lease.** In the absence of express statutory provision the dissolution of a corporation operates as an extinguishment of all debts due from or to it. In most of the states of the union provision has been made by statute for the winding up of corporations and saving the rights of those who have claims against them at the date of their dissolution. The United States supreme court has held that the executory contracts of a corporation are not extinguished by its dissolution.³⁶ And in the state of New York it has been expressly held that a lease to a corporation is not terminated by its dissolution but that the obligation to pay the rent due and which has accrued before dissolution may be enforced against the receiver of the corporation.³⁷ Where a corporation on the petition of its stockholders is voluntarily dissolved and a receiver appointed for its property, it comes under the rule that, in the case of an executory contract containing continuing mutual obligations, where one party voluntarily disables himself from further performing the contract, the injured party may sue at once for the entire damage sustained during the whole period caused by the loss of the contract. The obligation of the corporation to pay rent during the term is an executory agreement the performance of which in the future may be of value to the lessor and which the corporation by its voluntary action disables itself from performing. The case is stronger to protect the rights of the lessor where the receiver after his appointment elects, as he may do, to vacate the premises and to abandon the lease as an asset of the corporation. The breach of the covenant to pay rent is then complete and final and the lessor may at once present his claim for damages to the receiver

³⁵ *Farmer's Deposit National Bank v. Western Pennsylvania Fuel Co.*, 215 Pa. St. 115, 64 Atl. Rep. 374.

³⁶ *Shields v. Ohio*, 95 U. S. 319, 24 Law. ed. 357.

³⁷ *People v. National Trust Co.*, 82 N. Y. 283. See further as to the effect of the appointment of

receiver where a corporation had leased property and the lease was to run for 999 years and as long as the lessee corporation shall continue to exist as such and be capable of exercising all its functions. *New York El. R. Co. v. Manhattan Ry. Co.*, 63 How. Pr. (N. Y.) 14.

and sue at once if he shall refuse to pay. To accept any other view of the matter would be to confer an unlimited power upon all corporations of repudiating all their executory covenants by instituting proceedings by the stockholders for voluntary dissolution. True the damages for such a breach of contract are unliquidated, indefinite and difficult of proof, but a right to bring an action at once exists which is not to be defeated by any real or apparent difficulty in the remedy.³⁸

§ 57. **Power of municipal corporations to grant leases.** In determining the existence of a power in a municipal corporation to grant leases of the property which it holds and owns as such, a clear distinction must be made, and is made by most of the cases, between property which the corporation owns in a private or semi-private capacity, and property which it owns as a *quasi* trustee for a public or charitable use, or for some public purpose. Where the property is held in trust for the general use of the public the corporation cannot, without some express legislative authority lease or alienate the same to private persons or corporations.³⁹ This would be the case as regards lands devoted to the use of the general public as streets and highways, parks, wharves, levees, bridges and the like. Thus a lease by a city of such land for private purposes will generally be invalid in the absence of specific legislative authority in the city.⁴⁰ Where by the statute of title of school-houses is vested in the board of

³⁸ *Kalkhoff v. Nelson*, 60 Minn. 284, 288, 62 N. W. Rep. 332.

³⁹ *Weekes v. City of Galveston*, 21 Tex. Civ. App. 102, 51 S. W. Rep. 544, which related to a lease by a city of an island in its harbor originally conveyed to the city by the state for the use and benefit of the general public and for the advancement of navigation and fishing. See *Leaux v. City of New York*, 87 App. Div. 405, 84 N. Y. Supp. 514; *Pennsylvania R. R. Co. v. St. Louis, A. & T. H. R. R. Co.*, 118 U. S. 290; *Marine I. Co. v. Railroad*, 41 Fed. Rep. 643; *Thomas v. West Jersey R. R. Co.*, 101 U. S. 70; *Mahon v. Columbus*, 58 Miss. 310. A lease

by a city of property in which it had an easement only for levee purposes is void and confers no rights of possession as against the grantor of the easement. *Sanborn v. Van Dyne*, 90 Minn. 215, 96 N. W. Rep. 41.

⁴⁰ See on the general subject *Alve v. Henderson*, 16 B. Mon. (Ky.) 131, 168; *Macon v. Dasher* (Ga. 1893). 16 S. E. Rep. 75; *Mowry v. Providence*, 16 R. I. 422, 16 Atl. Rep. 511; *Warren Co. Sup. v. Patterson*, 56 Ill. 111; *Hoadley's Admr's v. San Francisco*, 124 U. S. 639; *San Francisco v. Itzell*, 80 Cal. 57; *Meriwether v. Garrett*, 102 U. S. 472.

education or in similar bodies in trust for the use of public schools, a lease of a public school for the purpose of carrying on therein a private or select school, is invalid as in violation of the trust. The use of the school by the lessee will be restrained at the suit of a taxpayer though he may not show any special injury and the mere fact that the use to which the lessee puts it is of the same character as the public use to which it was restrained, is not material, for by putting it to a private use it is evident that some portion of the public would be prevented from availing themselves of an opportunity to receive education.⁴¹ In respect to property which the municipal corporation owns in a *quasi* private capacity the power to lease is much more extensive and usually may be exercised without express statutory authority. The municipal corporation may lease its private property whenever it is deemed expedient and profitable to do so.⁴² If the lease be valid it will not be set aside for some irregularity in form or in the use of the corporate name.⁴³ Under this rule would come all cases where the municipal corporation should assume the power to lease buildings, such as town halls, engine houses, school-houses and similar structures owned and used by it in a semi-private capacity. Thus it is a very common occurrence, particularly in small towns, for the municipality to rent the town hall or city hall to private persons or to associations and lodges as a place in which to give concerts, fairs and similar entertainments. A person who has entered in possession under such a lease cannot be heard to plead its *ultra vires* character as against the city who is the lessor.⁴⁴ So also, where a building, which has been devoted to public uses is no longer used for such purposes, it may be repaired and rented to private per-

⁴¹ Weir v. Day, 35 Ohio St. 143.

⁴² Pacific Coast S. S. Co. v. Kimball, 114 Cal. 414, 46 Pac. Rep. 271; Belchers S. R. Co. v. Grain Elevator, 101 Mo. 192, 13 S. W. Rep. 822; Holywood v. First Parish (Mass.) 78 N. E. Rep. 124; Taylor v. Carondelet, 22 Mo. 105; Hand v. Newton, 92 N. Y. 88.

⁴³ New York v. Kent, 5 N. Y. Supp. 567; McDonald v. Schneider, 27 Mo. 405; St. Louis v. Merton, 6 Mo. 476. A statute which

enabled a county to "sell or otherwise dispose of its school land" enables the county to lease the land as well as to sell it and having leased it its lessees will be protected by the courts in their possession. Falls County v. De Lancey, 73 Tex. 463, 11 S. W. Rep. 492.

⁴⁴ Bell v. Platteville, 70 Wis. 139; Stone v. Oconomowoc, 71 Wis. 155.

sons by the city.⁴⁵ A municipal corporation may lease a part of a public building for private purposes if the portion leased is not necessary for municipal use, and the lease is valid and enforceable until some urgent public necessity arises for the use of the land leased for its original purposes. The use, however, must be a public and municipal use and the subsequent lease of the same land to another person for a private use, does not give the latter any right to occupation or to deprive the first lessee of his possession unless the second lessee shall see fit to compensate him. And upon general principles under such circumstances the second lessee has no action against the city for a failure to deliver possession where he knows or can ascertain by reasonable inquiries that the land was in the possession of another person as lessee.⁴⁶

§ 58. **A municipal corporation as a tenant.** Broadly speaking a municipal corporation has the right to lease a building for its use for city purposes, whenever the public necessities require it and it is deemed more expedient to lease than to buy.⁴⁷ This is so even in the absence of express statutory authorization as it is a necessary incident to municipal government and essential to the accomplishment of the municipal purposes. If the charter limits the length of the term, or prescribes the character of the buildings which may be hired or the formalities with which the lease must be executed it must be consulted and its terms followed. But in the absence of such statutory requirements the length of the term for which the city may legally contract to hire the building will depend upon all the circumstances among which may be mentioned the character of the building demised, its condition when the lease is executed, the purpose for which it is to be used by the corporation, the difficulty in securing other property, the prospects as to other similar buildings being erected, the financial condition of the city and other relevant facts.⁴⁸ A distinction is made between those powers of the corporation which are public and legislative and those which are of a purely business and semi-private nature. The

⁴⁵ *Bates v. Bassett*, 60 Vt. 530.

⁴⁶ *Union Ry. Co. v. Chickasaw Cooperage Co.* (Tenn.), 95 S. W. Rep. 171.

⁴⁷ *Davies v. Mayor, etc.*, of New York, 83 N. Y. 207.

⁴⁸ *City of Michigan City v. Leeds*, 24 Ind. App. 271, 55 N. E. Rep. 799.

power to execute a lease is merely a power to do a species of municipal business essential to the corporation's existence. And if the power to execute a lease is not required to be evidenced in a particular way the municipal corporation may be bound by an implied hiring arising from its use and occupation of premises to the same extent as an individual.⁴⁹ If the liability of the city to pay rent is, by the express terms of the lease made to depend upon the making of an appropriation to pay it by the city council, the city is not liable in an action for the rent if no appropriation has been made though the city has power to make the appropriation and, having received the benefit of the use and occupation of the premises, morally ought to have done so.⁵⁰ In Texas the courts have refused to apply the well recognized rule that a tenant holding over after the expiration of his term will by implication of law be regarded as agreeing at the option of the landlord to hold for another year upon the terms of his prior lease to municipal corporations. Hence, where a city rented premises for one year, with the right of a renewal; and the officers of the city occupied the premises and rent was paid for several years, no agreement for the creation of a tenant from year to year will be implied from holding over. The law will not imply a contract of lease from the fact that city officials, not by law authorized to execute a lease, have continued in the occupation of the demised premises after a valid lease for the same has expired. Where the municipal charter or other statute expressly prescribes in what manner and by what board or officials municipal contracts can be validly executed by the city, the municipal corporation cannot become bound by a lease which is not executed by the persons, or in the manner prescribed. And, although a contract may in a sense be implied on the part of the city to do justice where it has received the benefit of a contract which, under the statute, it had the power to make, but which was not executed in the statutory mode, the corporation cannot be held under an implied contract, where the contract is wholly executory.⁵¹ It has been held that a city under a charter providing that it shall have a general power of municipal cor-

⁴⁹ City of Michigan City v. City of Bridgeport, 75 Conn. 495, 24 Ind. App. 271, 55 N. E. 54 Atl. Rep. 196.
Rep. 799.

⁵¹ City of San Antonio v. French,

⁵⁰ Marsh, Merwin & Lemmon v. 80 Tex. 575, 16 S. W. Rep. 440.

poration at common law, and expressly authorizing it to lease real estate for the convenience of the inhabitants has power to lease private land for temporary use as a public street or highway, where the convenience of the inhabitants requires it. For, though it is true that ordinarily the fee simple title to streets and public highways is vested in the municipal corporation, yet it is conceivable that circumstances may arise calling for a temporary use only of private grounds for public traffic. Thus, it may be necessary for the city to secure a temporary right of way around some temporary obstruction in a street or to open a temporary street between two points while a permanent street is being built or repaired, particularly when the very dilatory process of taking land by right of eminent domain is considered. In the case of a lease under such circumstances, the only right the public acquires, is a right to use the premises temporarily as a street. When the term is at an end, the landlord may resume possession and after that date, his right becomes absolute as against the public. The premises thus used temporarily, never become public, but always remain private property, so that the principles which apply to ordinary city land do not apply here, and if the city at the expiration of the term fails to quit, and deliver up the possession, but continues to use it for public purposes, the landlord may at his option, hold the city as a tenant from year to year upon the terms of the lease.⁵² Unless it is expressly empowered to do so by its charter, a municipal corporation cannot lease land from a private owner for the purpose of carrying on a park or pleasure ground as a private enterprise for profit to be derived from subletting the land or privileges in the park or from payments by the public for admissions. Neither a charter power to hold real estate nor the power to make such necessary regulations as may be for the health, benefit or general welfare of the public, authorizes a municipal corporation to hire land for the purpose of engaging in private business. The rule would be different if the purpose for which the land was leased were a public one, such as the maintenance of a public park, a public wharf, or hospital or the opening of a street or an avenue for public travel or traffic. But the leasing of land for private business purposes is *ultra vires*, and will be

⁵² Gilman v. Milwaukee, 31 Wis. 563.

restrained by a court of equity upon the application of a taxpayer, and if such a lease is executed it will neither be enforced on the application of the lessee, nor can the lessor collect rent for its occupation by the municipal corporation.⁵³

§ 59. **Ultra vires leases by municipal corporations.** The general principles of the doctrine of contracts *ultra vires*, so far as it relates to and regulates the contracts of municipal corporations, are applicable to their leases. The authority of the officers of a municipal corporation to make leases is limited to such leases as are either expressly or by implication within the purposes for which the corporation was created and these purposes are customarily such as are specified in the charter or other statute under which the corporation has been incorporated. Municipal officers are held strictly within the scope of the powers and authority conferred upon them by statute, though of course such powers may be implied as well as express, and hence, it follows that no municipal officer can bind the municipal corporation either as lessor or lessee unless the lease be such a one as he has statutory authority to make. Persons dealing in contractual relations with municipalities are presumed to know the powers and authority under the statute of the officers with whom they deal; and, though this is simply a practical application of the rather far fetched fiction that every one is presumed to know the law, yet the principle is so well established and so well recognized by the courts that it behooves every intending lessee or lessor of a municipal corporation, not only to inform himself of the general characteristics of its charter but also of the specific powers, authorities and duties of the officer or official board with whom he is dealing. Whether or not a given lease is *ultra vires* can usually be determined only upon a careful examination of the municipal charter and collateral legislation, affecting and controlling the powers of municipal corporations in general, or of the particular city or town in question. There is, however, a wide distinction as to their enforcement between contracts which are illegal because beyond the corporate powers or because contrary to public policy, and those which are within the corporate powers but which have been made by an officer not possessing the power to execute them. The unauthor-

⁵³ *Bloomsburg Land Imp. Co. v. Borough of Bloomsburg*, 215 Pa. St. 452, 64 Atl. Rep. 602.

ized act of the municipal official in executing the contract without the authority to do so may be ratified, either by words or conduct on the part of the city, if it has the charter power to make such a contract. But a contract *ultra vires* cannot be ratified, unless the power to do so is expressly conferred by the legislature. Thus, where a municipal official hires or rents city property for a use or purpose which is consistent and compatible with the purposes of the charter, his action may be ratified by the action of the city in accepting or delivering possession, and paying or receiving rent according to the circumstances whether the city is the landlord or the tenant. But a lease absolutely *ultra vires* may be revoked by the city and the lessee cannot recover any damages he may have sustained thereby, though, if the consideration which has been received by the city has not been restored a court of equity will order that this shall be done before relieving the city from its obligation upon the lease.⁵⁴

§ 60. Leases of park grounds by municipal corporation. In the absence of an express statutory prohibition it is generally admitted that a municipal corporation owning and controlling grounds which are dedicated to, and used for a public park, may lease such grounds to private persons to be used by them for purposes which are germane to the general purpose for which the park was established. The principal and indeed the sole purpose of the establishment of public parks is to provide amusement and recreation for the general public and to give an opportunity to those who frequent them to enjoy the fresh air and quiet which they can find in no other place in the crowded city. As subsidiary purposes may be mentioned the opportunity to enjoy the beauties and delights of natural scenery as they have been enhanced by the skill and industry of the landscape gardener and to visit museums and art galleries which may be located within the confines of the parks. In making leases the city authorities must use care to secure such tenants only who will not by the use which they make of the ground leased to them seriously interfere with the purposes for which the public parks

⁵⁴ An *ultra vires* lease, executed by a city and afterward revoked by it, does not render the city liable to an assignee of the

lessee for the sum he paid for it. *Weekes v. Galveston*, 21 Tex. Civ. App. 102, 51 S. W. Rep. 544.

exist. It cannot be doubted that a lease of park lands for such a use as would materially prevent the free, uninterrupted and convenient use of the park by the public generally or by any numerous class of persons would be held by the court to be an unwarranted abuse of the municipal discretion. Leases of park land for hotel purposes have generally been sustained.⁵⁵ If the hotel is conducted in a proper manner it cannot fail to add to the advantages which the public will derive from the use of the park. For if it is proper for the city to provide recreation and amusement for the public it is certainly proper to provide for the rest and refreshments of those who resort to the parks for what the city has provided for them. And inasmuch as it is usually inexpedient if not illegal for a city to engage in hotel keeping, it is surely in its discretion for it to delegate this work to others under proper restrictions. By a long established custom refreshments have been for years served to visitors to the great parks of our country, so that it is too late now for a valid objection to be raised on the grounds of the diversion of the parks from their primary purpose by a lease of a portion of them for use as a hotel or restaurant.⁵⁶ In the absence of an express statutory prohibition, a municipal corporation, or its park department may lease a building on park lands for restaurant purposes to a private party. Such a building properly conducted as a restaurant will be of great public service to the frequenters of the park, add to its attractions, and conduce to the furtherance of the purposes for which parks are maintained, which is the recreation and amusement of the public. The municipal authorities cannot give a lease for an unreasonable term, or abdicate the general control which they must exercise under their charter powers over the city property. And if the effect of the lease is to prevent the park officials from performing any of the duties which they owe to the public, of the operation of the restaurant or other buildings which has been leased interferes ma-

⁵⁵ *Harter v. City of San Jose*, 141 Cal. 659, 75 Pac. Rep. 344, 346; *Gushee v. City of New York*, 58 N. Y. Supp. 967; *State ex rel. Attorney General v. Schweickart*, 109 Mo. 346, 19 S. W. Rep. 47.

⁵⁶ A lease of a portion of a pub-

lic park for training and running race horses is not necessarily *ultra vires*. But the absolute exclusion of the public from the park will not be permitted. *Bryant v. Logan*, 56 W. Va. 141, 49 S. E. Rep. 21.

terially with the use of the park by the public, or tends to diminish its utility for the purpose for which it has been created and for which it is supposed to be maintained, a court of equity will interfere and set aside the lease upon the instance and application of a resident taxpayer or other person having a legal capacity to sue. Thus a lease must always be subject to the power of the park officials to make such rules and regulations for the necessary government of the park as they may be authorized and commanded to make by the statute. On the other hand as soon as the lease is made and the lessee enters he is protected by the court from capricious and unnecessary interference by the park officials.⁵⁷

⁵⁷ *Gushee v. City of New York*, 26 Misc. Rep. 237, 56 N. Y. Supp. 967, 42 App. Div. 37, 92 N. Y. St. Rep. 967; affirm-
ing 26 Misc. Rep. 237, 56 N. Y. Supp. 1002.

CHAPTER III.

LEASES BY JOINT OWNERS.

- § 61. Leases by joint tenants and tenants in common distinguished.
62. Tenancy in common.
 63. The relation of landlord and tenants among tenants in common.
 64. Tenants in common as lessors.
 65. Actions by tenants in common to recover rent.
 66. Effect of a lease by joint owners.
 67. The right of joint tenants to the rent.
 68. The liability of joint lessees for rent.
 69. The liability for rent of co-partners in business.

§ 61. Leases by joint tenants and tenants in common distinguished. An important distinction exists as to the execution and operation of leases between those made by joint tenants and those made by tenants in common. If all the joint tenants unite in the execution of a lease it is regarded in law as but one lease made by one lessor. Where several tenants in common join in the execution of a lease it is regarded as several leases of their separate and respective shares.¹ While the joint ownership lasts joint tenants taken together constitute but one tenant of the land and therefore they are said to be seized *per tout*. For purposes of alienating the land each is seized *per my* and for this reason all the joint tenants are said to be seized *per my et per tout*. This being the case either of the joint tenants may make a lease of the whole property though it will not bind the others unless they shall assent thereto. In other words a lease of the property to be binding on all the joint tenants must either be executed or subsequently ratified by all of them.²

¹ Comyn's Digest, Title, Estates (G) 6; see *Jurdaln v. Steere*, Cro. Jac. 83.

² *Kingsland v. Ryckman* 5 Daly (N. Y.) 13; Co. Litt. 168b; Rolle's Abr. 488; *Morris v. Barry*, Wils. 1; *Bond v. Cartwright*, 1 Vent.

136, 162. A lease by one of several joint tenants "to the extent of his interest" carries not only an undisputed interest owned by him, but also an interest in the premises claimed by him but which is in litigation when the

§ 62. **Tenancy in common.** This species of tenancy differs from a joint tenancy in that in the case of a tenancy in common there need be no unity except a unity of possession. One of the tenants in common may hold the fee and another a life estate or a term for years. As to the quantity of land one may own the half and several others may own the other half, either equally or unequally among them.³ Neither of the several tenants in common is entitled to the exclusive possession of all the land to the exclusion of the others nor, until partition shall have been made, to possession of a particular part of it. Hence inasmuch as he cannot exclude his co-tenants by his own occupation of the land he is unable without their consent or their ratification to lease either all or any particular portion of the land in such a way that his lessee shall have the right to an exclusive possession of what the lessor has presumed to demise to him. A lessee of one tenant by a lease in which the others have not joined is as to them a trespasser so far as he occupies any portion of the land owned in common and liable to an action *quare clausum fregit*.⁴ The co-tenant in common cannot, before partition, lease a distinct portion of the estate by metes and bounds unless with the assent of his co-tenant but he may do so after a partition even though the partition shall have been made by parol.⁵ Though as to the lessor's co-tenant, a lessee of one tenant in common is a trespasser, yet, as to strangers, he is entitled to the occupation and possession of what he has been demised and may maintain his possession by the same means as though his lease had been executed by all the tenants in common.⁶ As between him and his lessor the same rules are applicable that regulate the relation of landlord and tenant generally. The lessee cannot deny the title of his lessor nor the title of the co-tenants of his lessor where all the tenants in common derive their title from the same source. On the other hand his lessor is bound to secure him in his possession and if he is ousted by the act of the co-tenants of his lessor it is an eviction as to his lessor and stops the running of rent as to him.

lease is signed but which he subsequently acquires. *White v. Stuart*, 76 Va. 546.

³ 2 Blackstone's Com. 192.

⁴ *Erwin v. Olmsted*, 7 Cow. (N. Y.) 227.

⁵ *Wood v. Fleet*, 36 N. Y. 499, 509; *Pope v. Whitehead*, 68 N. C. 101; *Whaley v. Danner*, 28 Ch. & Cef. 267.

⁶ *Collier v. Corbett*, 15 Cal. 183; *Hart v. Robinson*, 21 Cal. 346.

§ 63. The relation of landlord and tenants among tenants in common. It is permissible for two or more tenants in common to agree between or among themselves by an express lease that one or more of them shall have the exclusive use, control and possession of the premises, paying rent for the same to the others. If such an agreement is made the relationship of landlord and tenant exists between those who are in possession paying rent and those who are out of possession receiving it. But where there is no such express agreement the relation of landlord and tenant does not exist between one tenant in common in actual possession and the others.⁷ It is entirely competent for one tenant in common to make a lease of his undivided share to his co-tenant and to contract with him for that purpose.⁸ Undoubtedly they may create among or between themselves the relationship of landlord and tenant by an express oral or written agreement.⁹ Of course such a contract can exist only by the mutual intention and assent of the tenants in common. There must be an express contract of lease to create the relationship of landlord and tenant. The mere fact that one of two or more tenants in common is permitted the undivided occupation and control of the entire property and agrees to pay his co-tenants a reasonable compensation for the use of the whole property or for the use of his undivided share, does not create the relation of landlord and tenant. Nor would this relation be created if instead of the parties agreeing that one tenant in common should pay the other what the use of the shares of the others were reasonably worth they should fix and agree upon the precise sum of money which one tenant should pay the others for the use of the property. Nor would the use of the word "rent" to signify a share of the monthly income thus paid establish the existence of the relation of landlord and tenant.¹⁰ For a tenant in common in the possession of property is not liable to his co-tenants for rent or for use and occupation unless there was an express promise to pay rent or unless the tenant in possession excludes

⁷ Bird v. Earle, 15 Fla. 447; Corrigan v. Riley, 26 N. J. Law, 79, 783.

⁸ Smith v. Smith, 98 Me. 597, 57 Atl. Rep. 997.

⁹ Leigh v. Dickson, L. R. 12 Q. B. Div. 194.

¹⁰ Smith v. Smith, 98 Me. 597, 601, 57 Atl. Rep. 999. See, also, Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

his co-tenant from possession in which event he must account for the value of the property.¹¹ The rule is not altered by the fact that if the tenant in common had not occupied the land no rent would have been received for it.¹² A tenant in common though he does not exclude his co-tenant will be liable to account for the rent if he shall rent the premises to another.¹³ Where a tenant in common goes into possession of the whole of the premises under a lease thereof signed by his co-tenant as lessor and holds over after the expiration of the term he will be presumed to be holding over under the lease and not by virtue of his title as a tenant in common. The ordinary rule as to tenants holding over will then be applicable and the lessor may treat his co-tenant as a trespasser or as a tenant from year to year and collect rent according to the terms of the lease which has expired. This rule, however, is confined to cases where the co-tenant expressly leases the whole premises and occupies them solely by virtue of the terms of the lease for if he claims to be in possession under his own title a different rule is invoked.¹⁴ Married women who are tenants in common owning their share as separate property, may lease to their co-tenants and may thereafter, without joining their husbands as parties plaintiff, sue for rent due.¹⁵ If the

¹¹ *Terrell v. Cunningham*, 70 Ala. 100; *Fielder v. Chiles*, 73 Ala. 567; *Hamby v. Wall*, 48 Ark. 135, 2 S. W. Rep. 705, 3 Am. St. Rep. 218; *Belknap v. Belknap*, 77 Iowa, 71, 73, 41 N. W. Rep. 568; *Israel v. Israel*, 30 Md. 120, 125, 96 Am. Dec. 571; *Sargent v. Parsons*, 12 Mass. 149; *Holmes v. Williams*, 16 Minn. 164; *Izard v. Bodine*, 11 N. J. Eq. 403, 69 Am. Dec. 595; *Buckelew v. Snedeker*, 27 N. J. Eq. 82; *Valentine v. Healey*, 86 Hun, 259, 33 N. Y. Supp. 246, 247; *Cahoon v. Kinen*, 42 Ohio St. 190; *Ward v. Ward*, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449; *Hixon v. Bridges* (Ky. 1897), 38 S. W. Rep. 1046; *Carver v. Hoffman*, 109 Ind. 547, 10 N. E. Rep. 567; *Mumford v. Brown*, 1 Wend. (N. Y.) 53; *McKay v. Mumford*, 10 Wend. (N. Y.) 351; *Dres-*

ser v. Dresser, 40 Barb. (N. Y.) 200; *Wilcox v. Wilcox*, 48 Barb. (N. Y.) 327, 329.

¹² *Stephens v. Taylor* (Tex. 1896), 36 S. W. Rep. 1083.

¹³ *Ormer v. Harley*, 102 Iowa, 150, 71 N. W. Rep. 241; *McCaw v. Barker*, 115 Ala. 543, 22 So. Rep. 131, 132.

¹⁴ *Valentine v. Healey*, 86 Hun (N. Y.) 259, 261; *O'Connor v. Delaney*, 53 Minn. 247, 249, 54 N. W. Rep. 1108, 39 Am. St. Rep. 601. An agreement between tenants in common, as to a mode of enjoying the property pending a controversy as to its possession does not necessarily create the relation of landlord and tenant between them. *Corrigan v. Riley*, 26 N. J. L. 79.

¹⁵ *Cahoon v. Kinen*, 42 Ohio St. 190.

relationship of landlord and tenant is established or shown to exist between the tenant in common who is in occupation and those who are not in possession, the rent stipulated for in the instrument of letting may be collected by an action,¹⁶ and the parties to the lease, though they are tenants in common of the reversion, have the ordinary rights and obligations of landlord and tenant to one another. Thus the tenant in common who is the landlord has a lien upon the goods of the tenant in common who is a lessee for the rent of the premises.¹⁷ Where one tenant in common has by a lease demised his interest to his co-tenant if the tenant in common, who was the lessee, continues in the occupation as a tenant at sufferance after the expiration of the lease he will be liable in an action for use and occupation at the suit of his co-tenant.¹⁸

§ 64. **Tenants in common as lessors.** It is very well settled that one tenant in common cannot make a valid lease of the entire premises, which shall bind his co-tenants.¹⁹ For example, an agreement by one of several tenants in common allowing a stranger to erect sign boards on the land owned in common, does not bind his co-tenants.²⁰ A lease of land owned by several persons as tenants in common is valid as to all of them only when all join in its execution or subsequently ratify it. Such a lease is not binding upon those of the tenants in common who neither join in it nor ratify it. The lease is not, however, absolutely void as it is voidable merely by those who did not consent to its execution.²¹ The tenants in common who have not actually

¹⁶ *Elliott v. Knight*, 64 Ill. App. 87.

¹⁷ *Grabfelder v. Gazetti* (Tex.), 26 S. W. Rep. 436.

¹⁸ *Leigh v. Dickesen*, 54 L. J. Q. B. 18, 15 Q. B. D. 60, 52 L. T. 790, 33 W. R. 538.

¹⁹ *Lee v. Livingston*, 143 Mich. 203, 206, 106 N. W. Rep. 713.

²⁰ *Walker v. Marion*, 143 Mich. 27, 106 N. W. Rep. 400; *Moreland v. Strong*, 115 Mich. 211.

²¹ *De Witt v. Harvey*, 4 Gray (Mass.) 486, 49; *Cunningham v. Pattee*, 99 Mass. 248; *Traintor v. Cole*, 120 Mass. 162, 164; *Harms v.*

McCormick, 132 Ill. 104, 22 N. E. Rep. 511; *Edmonds v. Mounsey*, 15 Ind. App. 399, 44 N. E. Rep. 196; *Benoist v. Rothschild*, 145 Mo. 399, 46 S. W. Rep. 1081; *Mussey v. Holt*, 24 N. H. 248, 55 Am. Dec. 234; *Hayden v. Patterson*, 51 Pa. St. 261; *Jackson v. O'Rourke* (Neb. 1904), 98 N. W. Rep. 1068; *Martens v. O'Connor*, 101 Wis. 18, 76 N. W. Rep. 774. Tenants in common of land may make a joint lease. *Massie v. Long*, 2 Ohio, 287, 15 Am. Dec. 547; *Doe v. Fleming*, 2 Ohio, 501.

joined in the lease may subsequently ratify it expressly or by necessary implication. The acceptance of rent from a lessee by one or more of the tenants in common who have not signed the lease, a demand for rent made by them, their express recognition that the occupant is a lessee or any other fact showing an understanding on their part that he occupies the relationship of a tenant will be relevant to show a ratification. Their silence and neglect to object to the action of their co-tenant in executing the lease after the fact of its execution or the fact of the occupation of the premises by a person claiming to be in possession as a tenant may also be equivalent to a ratification. The lessee may rightfully assume that one of several tenants in common who alone executed his lease was authorized to do so by his co-tenants from the fact of their acquiescence and acceptance of rent.²² They may elect after its execution whether they will or will not ratify the acts of their fellow tenants in executing the lease and, if they desire to do this, a lessee who has occupied the premises under the lease cannot escape the payment of rent upon the ground that the lease is void and of no effect. Thus a sealed lease signed by one tenant in common for himself individually and as an agent for the other is not absolutely void nor can a tenant refuse to pay rent under his covenants therein, where he has remained in possession.²³

The lessee of one tenant in common who has entered and remained in possession of the premises with the consent of the other joint owners cannot when sued for the rent claim that the lease is void because it was not executed by all. Having enjoyed the possession he must abide by his covenant to pay rent.²⁴ In theory a lease of land by two or more tenants in common is not regarded as one lease by all of them of the premises in their entirety but as several leases by the tenants in common of their undivided separate and respective shares. The relation of landlord and tenant does not exist between a lessee of one tenant in common of a

²² *Valentine v. Healey*, 158 N. Y. 369, 373, 52 N. E. Rep. 1097, reversing 1 App. Div. 502, 37 N. Y. Supp. 287.

²³ *Harms v. McCormick*, 132 Ill. 104, 108, 22 N. E. Rep. 511. See *Moreland v. Strong*, 115 Mich. 211, 73 N. W. Rep. 140.

²⁴ *Codman v. Hall*, 9 Allen (Mass.) 335, 338, where one party executes a deed, it is his deed though the other party does not execute his part. *Com. Dig. Fait. C. 2.*

portion of the premises and the tenants in common of the lessor unless the lessee shall in fact attorn to the other tenants in common.²⁵ For tenants in common, having each several and distinct estates in the land cannot make a joint lease of the whole estate; but any lease made by them shall be taken to be the lease of each of his respective share, and the cross confirmation of each for the share of the other, with no estoppel on either part.²⁶ And though tenants in common join in making a lease using joint words, the lease operates in law as the separate lease of each for his moiety. The estates are several and the reversion is also severable.²⁷ The lessee of the tenants in common is the lessee of each of them and each one is a lessor and may sue separately for the rent unless it is expressly reserved to them jointly. The lessee of any one tenant in common of such tenant's share in the property which is owned in common upon his entry thereon, will have the same rights in relation to the other tenants in common which his lessor possessed before the demise.²⁸ Hence one tenant in common of land cannot regard the lessee of the share of another tenant in common as holding the relation of lessee to the former so as to give him a right to oust him from his possession of the undivided share which has been leased to him.²⁹ Where a lessee occupies under a lease from one of two or more tenants in common paying the rent reserved to his lessor, he is not liable for use and occupation to another tenant in common to whom he has not attorned and to whose occupation of his share of the property he has not objected. But by an attornment to the other tenants in common, with the consent of his lessor, his lease becomes binding on both and both are equally bound by its terms as from the beginning.³⁰

²⁵ *Austin v. Ahearne*, 61 N. Y. 6, 16, 17.

²⁶ *Beer v. Beer*, 12 C. B. 60, 81, 21 L. J. C. P. 124, 16 Jur. 923; *Doe d. Poole v. Errington*, 1 Ad. & E. 750, 755, 3 N. & M. 646, 1 Mo. & Rob. 343; *Joules v. Joules*, 1 Brown, 39; *Trepart's Case*, 6 Rep. 14*b*; *Moore v. Fursden*, 1 Show, 342.

²⁷ 1 Rolle, Abr. Estoppel (B.) p. 4, p. 877; Bac. Abr. Joint-Tenants (H.); Co. Litt. 45 a., 197 a.

Knight's Case, Moore, 199, 202; *Heatherly d. Worthington v. Weston*, 2 Wils. 232; *Challoner v. Davies*, 1 Ld. Ray. 404; *Doe d. Poole v. Errington*, 1 Ad. & E. 750, 755.

²⁸ *Keay v. Goodwin*, 16 Mass. 1, 4.

²⁹ *King v. Dickerman*, 11 Gray (Mass.) 480.

³⁰ *Austin v. Ahearne*, 61 N. Y. 6, 17.

§ 65. Actions by tenants in common to recover rent. By the ancient common law of England ^{30a} where land owned by tenants in common was leased, the lessors could recover arrears of rent by an action of debt in which all were obliged to join.³¹ This is possibly law where the rent is reserved on general terms. But as the ordinary rule is that while it is always allowable and usually advisable for all the tenants in common to join in an action for the rent yet if the payment of the rent is reserved to each of them separately each must bring a separate action. If the leasing is for an entire rent and the lease fails to state that it is reserved to each of the tenants lessors in proportion to his share in the reversion all the tenants ought to join, and the sum recovered is to be divided by the tenants in common according to their respective shares.³² But there are some authorities which hold that where the rent is reserved in an entire sum it is within the election of the several co-lessors whether they shall or shall not unite in an action to recover the same.³³ And where there has been a severance of the ownership of the rent, understood and acted on alike by the parties, one tenant in common may

^{30a} By the English cases, on a lease by joint tenants reserving the entire rent they may join in an action to recover the rent. If there be a separate reservation of rent to each of them, each must bring a separate action. In trespass or an injury to the possession, tenants in common must join. *Porter v. Bleiler*, 17 Barb. (N. Y.) 149, 155. In *Decker v. Livingston*, 15 Johns. (N. Y.) 482, it was said, "two tenants making a lease of their tenements for a term of years, the rent being behind, shall have an action of debt against the lessee, and not divers actions, for the action is in the personality." In *Hill v. Gibbs*, 5 Hill (N. Y.) 56, the rule is laid down generally that tenants in common must sue separately when the action is in the realty, and that they must join when the action relates to personality. Judge Bronson said, "the

action is not in the realty merely because it has some relation to land. Thus, debt for rent and covenant on not repairing upon a joint demise is a personal action, and tenants in common must join. So, too, they must join in actions for trespass or nuisance to the land," he adds, "the English rule was they may, ours say they must join."

³¹ Co. Litt. 198b, 316, 317.

³² *Bryant v. Wells*, 56 N. H. 152, 153; *Powis v. Smith*, 1 D. & R. 490, 5 B. & Ald. 850, 851, 24 R. R. 587. See *Harrison v. Barnby*, 5 T. R. 246, 2 R. R. 584; *Cutting v. Derby*, 2 Black, 1075; *Porter v. Bleiler*, 17 Barb. (N. Y.) 149, 155.

³³ *Martin v. Crompe*, 1 L. Ray. 340; *Bradburne v. Botfield*, 14 M. & W. 567; *Last v. Dinn*, 28 L. J. Ex. 94; *Huntley's Case*, 3 Dyer, 326a.

sue in his own name for what is due him without joining his co-tenant as a party to the action.³⁴ In the case of a joint demise by two tenants in common without specifying to whom the rent is reserved the rent follows the reversion and on the death of one of them the reversion being split the share of the deceased lessor goes to his heir who is thereafter entitled to the rent.³⁵

§ 66. **Effect of a lease by joint owners.** A lease of property by one of two joint owners, executed by one of them only, but with the consent and at the request of the other, is a lease of both.³⁶ Where all those who hold in joint tenancy make a lease of the land which they thus hold and one of the tenants dies the term still endures, though it was a lease at will, and the rent inures to the survivors. The lessee if he shall continue in possession after the death of one of two joint tenants may be sued by the survivor for the whole rent thereafter accruing.³⁷ Other-

³⁴ *Wolsey v. Lasher*, 35 App. Div. 108, 54 N. Y. Supp. 737; *Sanborn v. Randall*, 62 N. H. 620.

A covenant to pay rent to several lessors is a joint or a several obligation, according to the intention of the parties. If a lessee covenant with two or more lessors jointly to pay to each a specified share of the rent, the covenant is several, as the interest of each lessor is several, though the covenant to pay is joint. Each lessor may therefore sue for his proportion of the rent without joining the others. *Gray v. Johnson*, 14 N. H. 414, 418; *Withers v. Bircham*, 3 B. & C. 254; *James v. Emery*, 8 Taunt. 245.

³⁵ *Beer v. Beer*, 12 C. B. 60, 81, 21 L. J. C. P. 124, 16 Jur. 923.

A tenant in common of a reversion may maintain an action for an injury to the reversion without joining his co-tenant as a plaintiff. So, too, he may bring an action for the breach of a covenant in a lease running with the land without joining his co-tenants where the severance of the rever-

sion takes place after the demise. *Roberts v. Holland*, 62 L. Q. Q. B. 621, (1893) 1 Q. B. 665, 5 R. 370, 41 W. R. 491. A lease by a widow who is tenant of an estate in dower does not bind the heirs who are tenants in common with her. It gives the lessee no right to the use or possession of the land. The heirs who are co-tenants with the widow may ratify the lease and render it a valid and binding lease on them. The lease, however, is not void, but is voidable merely. Where one of the heirs is an infant he cannot ratify it. Where some of the tenants owning land subject to the widow's dower ratify her lease and the others take no action and the lessee goes in possession under the lease, an illegal combination between those who had ratified which shall result in an injury to the lessee is actionable. *Martens v. O'Connor*, 101 Wis. 18-21, 76 N. W. Rep. 774.

³⁶ *Wenger v. Raymond*, 104 Pa. St. 33, 36, 31 Pitts. L. J. 493.

³⁷ *Jackson v. Dunbar*, 68 Miss. 288, 290, 10 So. Rep. 38.

wise the survivor would lose the whole fruits and benefit of the survivorship and no injury can come to the lessee as he would have to pay the whole rent in any event.³⁸ In the case of a tenancy at will where the lessors are joint tenants, either may terminate the will without or even against the consent of the other.³⁹ Where there is a lease by joint tenants from year to year, either may, without the consent of the other and even against his express wishes, give a notice to quit to the lessee. A notice to quit signed by one of several joint tenants who are lessors is the notice of all.⁴⁰ If, however, a lease provides that the lessors being joint tenants shall all give notice to quit, a notice not signed by all is ineffectual to terminate the term. Thus where a lease provides that the lessor or his heirs or executors may give notice to quit under his or their respective hands and seals, and the lessor dies appointing three executors by his will all the executors must unite in the notice to quit and a notice signed by only two of them is not sufficient.⁴¹ One or two joint tenants may demise his or their portion to another so as to create the relation of landlord and tenant between them with a right to distrain as to rent in arrears.⁴² This would be the case where one joint tenant for the payment of an annual sum places another in exclusive possession of the whole of the premises and retires from its possession. The parties would then be estopped to deny they were landlord and tenant.⁴³

§ 67. **The right of joint tenants to the rent.** Where all the joint tenants unite in a lease reserving rent to all any one of

³⁸ *Henstead's Case*, 5 Coke, 10.

³⁹ *Co. Litt.* 186; *Whayman v. Chaplin*, 3 Taunt. 120.

⁴⁰ *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135, 141, in which case Lord Tenterden, C. J., said: "Upon a joint demise by joint tenants, upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each, the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please; and as soon as any one of the joint tenants gives a notice to quit, he effectually puts an end to

that tenancy; the tenant has a right, upon such a notice, to give up the whole, and, unless he comes to a new arrangement with the other joint tenants, as to their shares he is compellable to do so."

⁴¹ *Right v. Cuthell*, 5 Esp. 149, 5 East, 491, 499. If the lease does not require a notice by all executors, a notice by one of two or more executors will be sufficient.

⁴² *Cowper v. Fletcher*, 6 B. & S. 464, 473, 34 L. J. Q. B. 187, 11 Jur. (N. S.) 780, 12 L. T. 420, 13 W. R. 739; *Coke, Litt.* 186a, Bac. Abr. Leases (1), 5, p. 776.

⁴³ *Pleadall's Case*, 2 Leon. 259.

them may collect the rent and his release will release all the others.⁴⁴ And a reservation of rent to one joint tenant only enures to the benefit of all.⁴⁵ One joint tenant cannot sue separately for his share of the rent or for the rent which is due all of them. He must join with him as parties plaintiff in any and every action regarding the property or its income all the joint tenants.⁴⁶ On the death of one or more joint tenants who are lessors, the right of action to collect the rent is in the survivors.⁴⁷ On the death of one of two joint lessors, the survivor is the proper party to sue to recover for a breach of a covenant in the lease. Under such circumstances no right of action passes to the personal representative of the deceased lessor.⁴⁸ And where a joint lease was executed by the deceased lessor as a guardian, his ward, after attaining his majority, may join with the surviving lessor to enforce a covenant made for his benefit.⁴⁹ Inasmuch as all the authorities hold that parceners whatever may be their number, constitute but one heir and hold by unity of title as well as by unity of interest, it follows that none of them can sue for rent or for use and occupation or distrain for the same without joining the others.⁵⁰ Where one joint tenant receives more than his share of the rents from a lessee of the lands he is accountable in equity to his co-tenants for as much of the

⁴⁴ *Newman v. Keffer*, 18 Fed. Cases, No. 10,177; *Robinson v. Hoffman*, 1 M. & P. 474, 4 Bing. 562, 3 Car. & P. 234, 6 L. J. (O. S.) C. P. 113, 29 R. R. 627.

⁴⁵ *Sacheverel v. Frigate*, 1 Vent. 161; Co. Litt. 47a, 192a, 214a.

⁴⁶ *Dewey v. Lambier*, 7 Cal. 347; *Ellis v. Culver*, 2 Har. (Del.) 129; *Frazier v. Spear*, 2 Bibb (Ky.) 385; *Bullock v. Hayward*, 10 Allen (Mass.) 460; *Smoot v. Wathen*, 8 Mo. 522; *Pickering v. Pickering*, 11 N. H. 141; *Mobley v. Bruner*, 59 Pa. St. 481, 98 Am. Dec. 360; *Bonoyan v. Palmer*, 5 Mod. 171; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Hill v. Gibbs*, 5 Hill (N. Y.) 56; *Sherman v. Ballou*, 8 Cow. (N. Y.) 304; *Porter v. Bleiler*, 17 Barb.

(N. Y.) 149; *Cobb v. Kidd*, 8 Fed. Rep. 695, 696. *Contra*, *Sanborn v. Randall*, 62 N. H. 620. If after an action has been commenced by several joint tenants to recover rent one dies, the action may be prosecuted by the survivors. *Cobb v. Kidd*, 8 Fed. Rep. 695, 696.

⁴⁷ *Jackson v. Dunbar*, 68 Miss. 288, 10 So. Rep. 38; *Bryan v. Averett*, 21 Ga. 401, 402, 68 Am. Dec. 464.

⁴⁸ *Salisbury v. Shirley*, 66 Cal. 223, 226.

⁴⁹ *Salisbury v. Shirley*, 66 Cal. 223, 225.

⁵⁰ *Decharms v. Harwood*, 4 Maule & Sel. 490, 10 Bing. 526, 529, 3 L. J. C. P. 198; *Stedman v. Bates*, 1 Ld. Raym. 640.

rents as he has collected which exceeds what he is entitled to.⁵¹ Where rent has become due to several joint lessors an assignment of the reversion by one of them does not alter the nature of the bygone rent and hence the right of distress is lost.⁵²

§ 68. **The liability of joint tenants for rent.** Where the premises are leased to two or more tenants jointly all are both severally and jointly liable according to the exact language of the covenant to pay rent. Under a lease to two persons jointly, both are liable for the rent though only one has occupied. The occupation of one makes both liable on the joint and several covenant to pay the rent.⁵³ For the entry of one of two or more joint lessees under a lease which is signed by all at the date which is designated in the lease for the beginning of the term is the entry of all the lessees. All are bound thereafter to pay the rent, or for use and occupation though some never enter upon the premises.⁵⁴ On the other hand, if two persons to whom a lease is made as joint lessees enter, both are liable upon the covenant to pay rent though only one of them has in effect executed the lease.⁵⁵ Where the liability of joint lessees is both joint and several, a judgment for rent or for use and occupation may be recovered against any one of them separately.⁵⁶ Or a judgment may be recovered against them jointly and severally, and execution issued against only one of them in the discretion of the lessor. One of several joint lessees may show, when sued on the joint obligation to pay rent, that the lessor has, for a valuable consideration, released the joint and several liability and has accepted in its place a separate obligation and promise to pay rent for each joint lessee.⁵⁷ Among, or between joint lessees it will be presumed that relations of a confidential character exist. They may be regarded as *quasi* trustees towards each other so that no benefit can be acquired by any one of them from the lessor under the lease which shall not enure to the bene-

⁵¹ *Nelson's Heirs v. Clay's Heirs*, 1 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

⁵² *Stavely v. Alcock*, 16 Q. B. 636, 20 L. J. Q. B. 320, 15 Jur. 628.

⁵³ *Kendall v. Carland*, 5 Cush. (Mass.) 74, 80.

⁵⁴ *Goshorn v. Stewart*, 15 W. Va.

657, 665; *Glen v. Dungey*, 4 Exch. 61.

⁵⁵ *McLaughlin v. McGovern*, 34 Barb. (N. Y.) 208.

⁵⁶ *Ding v. Kennedy*, 7 Colo. App. 72, 41 Pac. Rep. 1112; *Wolz v. Sanford*, 10 Ill. App. 136.

⁵⁷ *Walker v. Githens*, 156 Pa. St. 178, 181, 27 Atl. Rep. 36.

fit of his co-lessees. Thus, a renewal of a lease in which two or more are jointly interested as lessees which is procured in the name of one lessee only, but which was intended to be for the benefit of all will enure to the benefit of all the joint lessees.⁵⁸ One of several lessees jointly and severally liable to pay rent who is compelled to pay the whole rent which becomes due under a covenant to pay rent has an action for contribution against those who are jointly liable with him. This is equally true in the case of a covenant by lessees jointly liable to repair the premises. But one tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against a co-tenant for contribution.⁵⁹

§ 69. **The liability for rent of co-partners in business.** The members of a firm which is a tenant under a lease are liable jointly and severally on the covenant to pay rent and also for use and occupation. A signature by the firm name subscribed by one partner will be binding upon all upon the theory that each partner is in law the agent of all. So, a lease signed by one partner individually as lessee and witnessed by all the others who signed their names individually binds the firm.⁶⁰ But a lease in writing under seal to several partners which is only signed by one for himself and as an agent for the other partners is not binding upon the others unless there is an agency also under seal.⁶¹ One who becomes a partner after the execution of a lease by his co-partners becomes liable thereby individually and jointly for the rent to the same extent as those who have executed the lease. But this rule applies only where the lease has actually become in some manner one of the partnership assets.⁶² A lease by one member of a firm owning real estate is binding upon all where it is authorized or ratified by them. A lease of real estate which is brought into a partnership business and is used as partnership property made by one partner in his

⁵⁸ *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 15.

⁵⁹ *Leigh v. Dickeson*, 54 L. J. Q. B. 18, 15 Q. B. D. 60, 52 L. T. 790, 33 W. R. 538.

⁶⁰ *Busman v. Ganster*, 72 Pa. St. 285.

⁶¹ *Snyder v. May*, 19 Pa. St. 235, 240.

⁶² *Guinzburg v. Claude*, 28 Mo. App. 258.

own name to a third party will not inure to his individual benefit. It will be for the benefit of the firm and he will be regarded as a trustee for the firm to the extent of the rents received by him.⁶³ Where there is a lease by partners and one of them dies the other may sue for the rent as a survivor. This is the rule where they sue on the covenant to pay rent. A surviving partner, however, who sues for use and occupation taking place after the death of the other partner may sue in his individual name and for his own benefit.⁶⁴

⁶³ *Moderwell v. Mullison*, 21 Pa. St. 257.

⁶⁴ *Wheatley v. Boyd*, 7 Ex. 20.

CHAPTER IV.

LEASES BY AGENTS.

- § 70. The agent's authority to lease must be strictly pursued.
- 71. The apparent authority of the agent.
 - 72. Lease under seal made by an agent.
 - 73. An agent's authority in writing under the statute of frauds.
 - 74. The ratification of a lease executed by an agent without authority from the principal.
 - 75. The fraud and false representations by an agent.
 - 76. The authority of an agent to accept possession on abandonment by the tenant.
 - 77. The power of an agent appointed to manage property.
 - 78. Where the agent renders himself personally liable.
 - 79. Undisclosed principal where a lease is under seal.

§ 70. The agent's authority to lease must be strictly pursued. An agent whether he has been authorized in writing or by parol to lease the premises, must proceed strictly according to the powers which have been conferred upon him by his principal, and if he exceeds his authority his principal is not bound by his acts.¹ Thus an agent who has a general power to make leases for his principal does not, by implication, possess the power to grant leases of his principal's lands which shall contain particular or unusual covenants or which confer special and peculiar privileges upon the tenant. So an agent who has merely the power to lease for a term of years does not bind his principal to give a renewal where, in making a lease for a term of years, he inserts in the lease, without the consent of his principal, a clause giving the tenant the right to a renewal.² The authority vested in an agent to make a lease for one year does not permit him to bind his principal by a lease for a longer term. Nor will an

¹ "An attorney either at law or in fact has no authority either to make a lease, or to ratify or confirm an imperfect one, or to perfect an inchoate agreement for a lease of property of his principal

or client, unless authority for such purpose is expressly given." Howard v. Carpenter, 11 Md. 259, 281.

² Schumacher v. Pabst Brewing Co., 78 Minn. 50, 80 N. W. Rep. 838.

agent who has power to lease a tract of land at a rent specified by implication have power to lease a portion of the tract.³ An agent who has the authority to lease his principal's land which is vacant and unimproved cannot bind his principal by a clause in the lease to build houses or to make improvements upon the land.⁴ Even though the agency be created by an instrument conferring very wide powers and discretion upon him, nothing will be implied in favor of the agent, and against the principal. Thus a power of attorney by which the attorney is to hold possession of a farm providing that it is to be "the same as if it were your own, I intend it will be" does not empower the attorney to lease it to a creditor and to apply a part of the rent on his own debt.⁵ Some of the cases, however, construe the power of an agent to lease with considerable more liberality. Thus, a general power to lease, to rent or to let conferred upon an agent has been considered sufficient, not only to enable him to make a new lease, but also to extend a lease which has expired.⁶ Usually a general agent of the landlord or a general manager of his property has a more extensive power in relation to leasing his principal's property than an agent whose sole duty it is to collect rent. The power and authority of an agent to collect rent are very limited. This matter is regulated by the general rules of the law of agency. It has been held that an agent who has the general and exclusive charge of the business of his principal may have the power to modify the terms of existing leases. Thus, in New York it has been held that a general agent has power to modify the express terms of a lease which was executed by his principal by agreeing that a tenant of premises which have been destroyed by fire may occupy the premises rent free until repairs have been made or until the premises have been restored to a tenantable condition. The modification is valid and binding on the principal though not made with his knowledge, as the remaining in possession of the tenant is the consideration of the agreement by the agent for under the New York statute the tenant has the right to abandon the premises and the rent ceases.⁷

³ *Borderre v. Den*, 106 Cal. 594,
600, 39 Pac. Rep. 946.

⁴ *Peddicord v. Berk*, 74 Kan. 236,
86 Pac. Rep. 465.

⁵ *Ward v. Thrustin*, 40 Ohio St.
347.

⁶ *Pittsburg Mfg. Co. v. Fidelity
Title & Trust Co.*, 207 Pa. St. 223,
56 Atl. Rep. 436.

⁷ *Ireland v. Hyde*, 69 N. Y. Supp.
839.

An agent who is empowered to attend to the repairs of premises owned by his principal will not be permitted to exceed his authority. Doubtless his authority will permit him to bind his principal by contracts to furnish labor and material for the ordinary repairs of the premises leaving it for the court to determine what shall constitute ordinary repairs. But he has little, if any, power to bind his principal in other respects. Thus, for example, his representation as to the safety or healthfulness of the premises made to the tenant when the lease is executed are not binding on the landlord. His power to bind his principal by statements as to the condition of the premises is not as extensive as that of an agent who is employed to rent the premises.⁸

§ 71. **The apparent authority of the agent.** A lessee of land dealing with an agent who has an apparent authority to make the lease, may rely upon that appearance of authority, and the principal will be bound by the acts of the agent within the scope of the apparent authority. But, the lessee who relies upon such apparent authority to sustain a lease which has been made by the agent must either show that the agent has done similar acts in excess of his real authority which were subsequently ratified by the principal or that the particular lease in question was actually ratified by the principal either expressly or by implication. Generally speaking, an agent whom the landlord has appointed merely for the purpose of collecting the rents of his real estate cannot be regarded as having an implied power to lease the premises. He is not a general agent but merely a special agent for a single purpose. Of course, his actions in making a lease may be ratified by his principal as would be the case where the agent collected the rent on a lease made by him, and the principal, knowing of the making of the lease, accepted and retained the rent. According to some authorities, the agent whose sole power is to collect the rents may make a lease at will which is binding on the landlord, for it is said that, having to make a return of the rents to his principal, the latter might suffer a loss if the agent were not by implication given the power to lease the premises at will.⁹ An agent whose duties are merely the care and supervision of land, as for example, a steward or

⁸ Daley v. Quick, 33 Pac. Rep. 559, 99 Cal. 179.

⁹ Woodfalls' Landlord & Tenant, 63; Tibbitts v. Moore, 19 N. H. 369.

land agent, cannot usually bind his principal either by a contract to make a lease or by a lease itself.¹⁰ But in one case it was held that the power vested in a steward to manage and superintend a landed estate will authorize him to bind his principal by an agreement to make the usual and customary leases according to the nature and extent of the property.¹¹ But, it has been held in England that a farm bailiff upon whom express authority had been conferred to lease lands from year to year upon the ordinary terms which were recognized in the neighborhood, and to receive the rents accruing under such leases, has not the implied authority from such circumstances to let the land upon unusual terms unknown to the owner and to insert express stipulations in the lease without express authority to do so on the part of his principal.¹² So, also, a general agent among whose duties is that of collecting rents, making repairs and attending to the care of the premises belonging to a non-resident landlord has no power to change the terms of existing leases by discounting rents which are not due and by accepting for the same less than is due.¹³

§ 72. **Lease under seal made by an agent.** At the common law where a lease executed by an agent is executed under seal, or where a lease must be executed under seal and an agent executes it, his authority to execute it must also be under seal.¹⁴ On the other hand, the authority of the agent to make a parol

¹⁰ *Coller v. Gardner*, 21 Beav. 151.

¹¹ *Peers v. Sneyd*, 17 Beav. 151.

¹² *Turner v. Hutchinson*, 2 F. & F. 185.

¹³ *Halladay v. Underwood*, 90 Ill. App. 130.

¹⁴ As to the rule in the case of deeds generally, see *Rowe v. Ware*, 30 Ga. 278; *Bragg v. Fesenden*, 11 Ill. 544; *Maus v. Worthing*, 4 Ill. 26, 27 (Breeze, J., dissenting); *Rhodes v. Louthain*, 8 Blackf. (Ind.) 413; *Wheeler v. Nivins*, 34 Me. 54; *Banergee v. Hevey*, 5 Mass. 11, 23; *Shuetz v. Bailey*, 40 Me. 69, 75; *Smith v. Perry*, 29 N. J. L. 74; *Kime v. Brooks*, 9 Ired.

(N. Car. Law) 218, 220; *Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68; *Cooper v. Rankin*, 5 Binn. (Pa.) 612; *Gorden v. Buckley*, 14 S. & R. (Pa.) 331; *Cain v. Head*, 1 Coldw. (Tenn.) 163; *Turbeville d. Darden v. Ryan*, 1 Humph. (Tenn.) 113; *Harrison v. Jackson*, 7 T. R. 207; 3 Bacon's Abr. tit. "Leases," 408. The only exception to this rule occurs in a case where the agent or attorney affixes the seal and signs the name of the principal in the actual presence of the latter. *Maus v. Worthing*, 4 Ill. 27.

lease which is to be executed by him for his principal or his authority to make an agreement for a lease, which is to be executed under seal by the principal, need not be in writing.¹⁵ An agent may be authorized by parol to make a lease which may be valid without writing.¹⁶ And an agent may be authorized by parol, to execute a written contract binding his principal to make a lease for more than one year.¹⁷ The common law rule which requires the authority of an agent to execute an instrument under seal to be evidenced by some writing itself under seal is admittedly technical and the courts in modern times have sought strenuously to relax it. No authority under seal was required to execute a writing not under seal. And the reason of this is that such writings not under seal, such as notes and the like are usually barred by statute unless they are sued on and enforced within a comparatively short period. But deeds being usually evidence of the title to real property and being capable of being produced to enforce rights after some considerable lapse of time, when the conditions and circumstances under which they were executed by the agent are incapable or at least difficult to be proved are on an entirely different footing. In such cases it is but reasonable in order to avoid forgery and fraud in the use of deeds to require the person who relies upon the deed to show, in a case where it is executed by an agent, by some writing of equal solemnity and formality with the instrument he claims under, that the agent was authorized to execute it.¹⁸ And where an agent has without authority under seal, executed a sealed instrument, the subsequent action of the principal in executing another instrument under seal to take the place of the invalid instrument constitutes such a ratification of the latter as will validate it from the time of its execution,¹⁹ and estop the principal from asserting its invalidity. So, where an agent without any authority under seal, executes a sealed instrument in the name of his principal and, on the instrument being shown to the prin-

¹⁵ *Brown v. Eaton*, 21 Minn. 409; *Coles v. Trecothick*, 9 Ves. Sr. 234, 250.

¹⁶ *M'Gunnagle v. Thornton*, 10 S. & R. (Pa.) 251, 253; *McDowell v. Simpson*, 3 Watts (Pa.) 129.

¹⁷ *Lobdell v. Mason*, 71 Miss. 936,

15 So. Rep. 44; *Curtis v. Blair*, 26 Miss. 309.

¹⁸ *Kime v. Brooks*, 9 Ired. Law (N. Car.) 218, 221.

¹⁹ *Bragg v. Fesenden*, 11 Ill. 544, 545.

principal after his name and seal have been put upon it by the agent, the principal acknowledges it to be his act and deed, or uses words which are equivalent to such acknowledgment, its ratification will be implied and it will be valid *ab initio*.²⁰

§ 73. **The agent's authority in writing under the statute of frauds.** In some states under the statute of frauds, the agent's authority to make a lease for more than one year, must be in writing.²¹ Where it is provided by statute that no lease of lands to exceed one year can be executed by an agent unless he is authorized in writing to do so, a lease for more than one year which is executed by the agent of the lessor and which is delivered to the lessee is void if the agent was not authorized in writing to sign the lease. And the fact that the duplicate copy retained by the principal was afterwards signed by him does not validate the lease where it does not appear that this signing was ever brought to the knowledge of the lessee.²² In the absence of statute, a lease for one year in writing and not under seal, may be executed by an agent whose authority is created by parol.²³ Under the statute of frauds, a lease for a term of three years, though signed by an agent, is not binding upon the lessee unless the agent's authority from the lessor is in writing.²⁴ So the agent must be authorized in writing in order to bind his principal in the adoption of the lease for more than one year.²⁵ The performance of the conditions of an invalid lease by the lessee will take the lease out of the statute of frauds. Thus a lessee who has been in the possession of the premises and paid rent for more than a year, cannot object that a lease in writing is invalid under the statute of frauds, or refuse to pay rent because it was executed by an agent who was not authorized in writing

²⁰ *Rhode v. Louthain*, 8 Blackf. (Ind.) 413.

²¹ Cal. Civ. Code, § 1624, subd. 5; How. St. Mich., § 6179.

²² *Chesebrough v. Pingree*, 72 Mich. 438, 445, 40 N. W. Rep. 747, 1 L. R. A. 529. See, also, *Hammond v. Winchester*, 82 Ala. 470, 2 So. Rep. 892; *Darity v. Darity* (Tex.), 71 S. W. Rep. 950.

²³ *Lehman v. Nolting*, 56 Mo.

App. 549; *Hoover v. Pacific Oil Co.*, 41 Mo. App. 317.

²⁴ *Hoover v. Pacific Oil Co.*, 41 Mo. App. 317; *Lehman v. Nolting*, 56 Mo. App. 549; *Chesebrough v. Pingree*, 72 Mich. 438, 40 N. W. Rep. 747. See, also, *Borderre v. Den*, 106 Cal. 594, 600, 39 Pac. Rep. 946.

²⁵ *Sheo v. Seeling*, 89 Mo. App. 146.

by the landlord to execute the lease.²⁶ But it has also been held that a lease made by an agent which is absolutely void under the statute of frauds because the authority of the agent to make the written lease is not in writing, is not good as an oral lease for a year. If the statute expressly declares such lease to be void, it cannot be valid for any portion of time however short.²⁷

§ 74. **The ratification of a lease executed by an agent without authority from the principal.** Upon general principles of the law of agency there can be no question that a lease which has been executed by an agent in the name of his principal which either exceeds the authority of the agent, or which the agent had no authority to execute, may be ratified and subsequently confirmed by the principal so that it will become valid and binding upon him. The principal may ratify and validate the invalid action of the agent, either by express oral language, by writing or by some act, such as receiving rent, which will estop him from afterwards rejecting the lease.²⁸ A ratification by the principal may be inferred from his acts and conduct as well as from his express language. In order to constitute a ratification by conduct, the acts and conduct which are relied upon must be clearly proven to the satisfaction of the jury. No ratification of the lease will be implied from weak or doubtful circumstances which are capable of a construction which is consistent with a repudiation of the action of the agent. The action of the principal in putting a tenant in possession and receiving rent from him which agrees with the terms of the lease is a ratification by the principal.²⁹ The knowledge of the action of

²⁶ Tean v. Pline, 60 Mich. 385,
27 N. W. Rep. 557.

²⁷ Borderre v. Den, 106 Cal. 594,
600, 39 Pac. Rep. 946.

²⁸ Irons v. Reyburn, 11 Ark. 378;
Borderre v. Den, 106 Cal. 594, 609,
39 Pac. Rep. 946; Bragg v. Fessen-
den, 11 Ill. 544; Powell v. Gos-
som, 18 B. Mon. (Ky.) 179, 192;
Adams v. Power, 52 Miss. 828, 833;
Anderson v. Connor, 87 N. Y. Supp.
449; Overby v. Overby, 18 La. Ann.
546; Baines v. Burbridge, 15 La.
Ann. 628; Breithaupt v. Thurmond,
3 Rich. (S. C.) 216; Wisconsin

Bank v. Mortley, 19 Wis. 62;
Trout v. McDonald, 83 Pa. St. 144;
Ducan v. Hartman, 143 Pa. St.
595, 22 Atl. Rep. 1099, 48 L. I. 441,
re-affirmed, 149 P. St. 114, 24 Atl.
Rep. 190.

²⁹ Bless v. Jenkins, 129 Mo. 647,
31 S. W. Rep. 938. The failure of
a married woman to notify one
who leased her property from her
husband in the name of the hus-
band, and without the knowledge
or consent of the married woman,
of her ownership, does not estop
her from disputing the validity of

the agent in signing and executing the lease must be brought home to the principal and when knowing exactly what the agent has done in leasing the property he enjoys the benefits and fruits of the agent's acts, he will not be permitted to repudiate his acts. Under this rule it is unquestioned that the receipt of rent by the principal under a lease which had been made by the agent without the authority of the principal would constitute a ratification of the lease.³⁰ And where the principal receives rent after the execution of a lease by an agent without authority or where the lease is invalid because not under seal, equity will compel the principal to ratify the lease, and will order a seal attached thereto and direct the principal to do anything else which will validate the lease.³¹ Where the actions and conduct of the principal are relied upon to constitute a ratification of a lease made by an agent without authority, it must appear that the principal was acting with a full knowledge of all the material facts in the case. For the actions of the principal done in complete ignorance of the conduct of the agent cannot be regarded in law as a ratification.³² Where an agent of a landlord having power to rent for one year only, rents for two years, and during the second year the principal received the rent agreed upon, it is a question for the jury to determine whether the principal ratified the letting by the agent. The jury might infer from such evidence that he was a general agent for the renting of the property. If being such, he was limited by instructions

the lease. The fact that the property stood in the name of the true owner on the record is always material. So it is not material, so far as the power of the wife is concerned to deny the validity of the lease, that the lessee always paid his rent to the husband, and in doing so always supposed he was the sole owner of the premises. *Long v. Poth*, 73 N. Y. St. Rep. 251, 37 N. Y. Supp. 670, 16 Misc. 85.

³⁰ *Roby v. Cossitt*, 78 Ill. 638; *Haynes v. Seachrest*, 13 Iowa, 455; *Ruggles v. Washington Co.*, 3 Mo. 496; *Hastings v. Bangor House Proprietors*, 18 Me. 436;

Reid v. Hibbard, 6 Wis. 175; *Wisconsin Bank v. Morley*, 19 Wis. 62.

³¹ Story on Agency, § 239.

³² *Chapman v. Lee*, 47 Ala. 143; *Mapp v. Phillips*, 32 Ga. 72; *Tidrick v. Rice*, 13 Iowa, 214, 221; *Dickinson v. Conway*, 12 Allen (Mass.) 487; *Hammond v. Hannin*, 21 Mich. 374; *Gulick v. Grover*, 33 N. J. Law, 463; *Seymour v. Wyckoff*, 10 N. Y. 213; *Meehan v. Forrester*, 52 N. Y. 277; *Wright v. Burbank*, 64 Pa. St. 247; *Williams v. Storm*, 6 Coldw. (Tenn.) 203, 207; *Vincent v. Rather*, 31 Tex. 77.

to rent for one year, and in violation of his instructions, rented for two years, slight evidence of ratification by the landlord would be sufficient. Under such circumstances the principal is responsible to the innocent third persons not having knowledge of a limitation upon the power of an agent to lease the premises for the act of the agent; providing he does not promptly repudiate such acts before the tenant has entered.³²

§ 75. **Fraud and false representations by an agent.** The question of the binding character upon a principal, of fraudulent conduct and false representation by the agent in the leasing of property has frequently been discussed. Unquestionably a principal who is proved to have instructed his agent to misrepresent the condition of the premises, or the rate of rent which he has received from them, or who at the time of the execution of the lease, knows that his agent has been guilty of fraud or falsehood in this respect, though not by his direction, will be held responsible for his agent's acts. Thus, if an owner of property, knowing that the premises were unsafe, uninhabitable or objectionable on account of a nuisance existing in or near them should employ an agent to lease the same who was ignorant of these facts; and the agent, being thus ignorant of these facts represents the premises as being desirable and safe the principal would be liable for the representation of his agent. So, where the owner of a house who employed an agent to let it for him and stated to the agent that it was in good condition and unobjectionable in every respect, and the agent, relying on these statements, rented the house which was objectionable because it was located next door to a disorderly house, it was held that the lease was not binding on the tenant because of the misrepresentation made by the agent.³³

§ 76. **The authority of an agent to accept possession on abandonment by the tenant.** The tenant must prove that an agent to whom he may have delivered the keys of the premises had authority as the agent of the landlord to accept them and thus assent to a surrender. The agent's authority to assent to a surrender will not be inferred from authority in the agent to collect the rent of the premises. Nor will the failure, neglect or

³² Reynolds v. Davison, 31 Md. 662, 688.

³³ Fuller v. Wilson, 3 Q. B. 58, 68; Bennett v. Judson, 21 N. Y. 238.

refusal of the landlord to return a key delivered to the agent by the tenant on the abandonment of the premises by the latter amount to a ratification of the acceptance by the agent and create a surrender by operation of law where the landlord does nothing else conclusively indicating an intention on his part to accept the keys in token of surrender.³⁴ The power to accept a new tenant in the case of a lease executed under seal for a term which exceeds a year and to release the former tenant by the acceptance of his surrender must be expressly conferred and will not be implied. The mere fact that the agent has general power to act for the landlord in the care of his property does not necessarily confer on the agent the power to accept a surrender of the premises or to make a new lease to a new tenant. Thus, an agent whose duties are to make leases, to receive rents, to give receipts for the same and to allow for the expenses of repairs made by tenants, possesses no implied power to accept a surrender of a lease which is in writing and which is under seal.³⁵ The surrender of a key to an agent of this character, unless with the direct consent of the landlord, or with his subsequent ratification, does not constitute a surrender by implication of law. But a general agent will have his power to act for the landlord given a fairly reasonable construction. An agreement by him to pay the expenses which a tenant might incur in moving if he would promptly move from the premises on the expiration of his term is within the scope of the power of a general agent who has power to lease, to collect rent and to look after the premises generally.³⁶

§ 77. **The power of an agent appointed to manage property.** Real estate agents who make it their business to let houses or other real estate, are, if shown to be in possession of the keys of the house, at least *prima facie* authorized to grant leases for the premises upon such terms as they may see fit to make and also to give the tenant possession. But this presumption may be

³⁴ Blake v. Dick, 15 Mont. 236, 38 Pac. Rep. 1072; Thomas v. Nelson, 69 N. Y. 118; Baylis v. Prentice, 75 N. Y. 604; Ryan v. Jones, 20 N. Y. Supp. 842, 2 Misc. Rep. 65; Barkley v. McCue, 55 N. Y. Supp. 608, 25 Misc. Rep. 738; Barkley v. Holt, 84 N. Y. S. 957.

³⁵ Wallace v. Dinning, 11 Misc. Rep. 117, 32 N. Y. Supp. 159; Wilson v. Lester, 64 Barb. (N. Y.) 431, 433.

³⁶ Creighton v. Finlayson, 46 Neb. 457, 459, 64 N. W. 1103.

rebutted by proof on the part of the landlord that the authority of the agent was restricted by him. It is the duty of the tenant, in dealing with the agent, to ascertain the limits and character of the authority which the principal has delegated to him. The existence and scope of the authority of the real estate agent to let premises and to bind his principal is to be determined in the same manner as the authority of any other sort of agent. The court in determining the scope of his authority will take into consideration the facts in the case, the usages of the locality if there are any and particularly the conduct of the principal in prior transactions with the agent. A written authority "to act as our agent for our properties and to manage said properties" is very general and at the same time very vague in its terms. The precise limit of a power to manage land would depend largely upon the circumstances and conditions of the land as they are shown in the evidence. On the one hand the power to manage land would clearly not authorize an agent to sell it. It is also clear that it would clearly authorize him to make leases in the ordinary form and on the ordinary terms. Construing this power it may safely be said that a power to manage land implies authority in the agent to do all that had been done prior to the creation of the power by the principal, or by other persons with the express or implied assent or consent of the principal except to sell the land or to mortgage it. In other words it is implied that the agent may do what is usual and customary to do with property of the kind in that locality. Under such a power the agent could lease farmland for terms and on conditions usual for farms in the vicinity where the land is located. And an agent having such power could unquestionably lease dwelling or business property, located in a town or city, upon such terms and conditions as are customary in the town or city where the property is located. So, for illustration, if there were an open mine on the land the management of it might include the working or leasing of the open mine by the agent. And on the other hand the opening of a mine where none had been opened before, or the making of a lease conferring the power to open mines, would be a doubtful act unless perhaps the land were located in a mining country and its use for other purposes is thereby necessarily limited. But an agent with power to manage property, or with a general

power for a limited period, has no power thereby to make a lease for a long term which shall extend beyond the period during which he has a right to act. Thus, an agent to manage land appointed for one year only cannot grant a lease for fifteen years of the sole right to quarry, take or sell stone or coal from the land which is already improved and is valuable mineral land. And the consideration in this case would be that this was not a grant of an annual profit which, when taken out of the land, would be replaced by the operation of nature, but a permanent diminution of the body and value of the land itself which would be similar to the opening of a mine where none had been opened before and hence would be clearly not within the power of the agent appointed for the ordinary management of property.³⁷ An agent who is instructed or who has an agent's power to lease to a responsible tenant is answerable in damages to his landlord if he fails to exercise reasonable diligence in ascertaining the responsibility of the tenant. He must make the same inquiry regarding the tenant as a prudent man would make in carrying on his own affairs.³⁸ So, an agent authorized to let premises must act in good faith to his principal and he cannot let the premises to himself without the consent of his principal given after a full disclosure of all the circumstances by the agent to the principal.³⁹

§ 78. **Where the agent renders himself personally liable.** In order to escape personal liability, the agent who executes the lease should always sign the name of his principal by himself as agent, thus, "John Doe by Richard Rowe his agent" or "his attorney" as the case may be.⁴⁰ For in the case of a lease or other writing which is signed "John Doe agent for Richard

³⁷ *Duncan v. Hartman*, 143 Pa. St. 595, 606, 22 Atl. Rep. 1099, 24 Am. St. Rep. 570; *Id.*, 149 Pa. St. 114, 24 Atl. Rep. 190.

³⁸ *Hayes v. Tindall*, 1 B. & S. 296; *Hemmenway v. Hemmenway*, 5 Pick. (Mass.) 389; *Moore v. Gholson*, 34 Miss. 372; *Anthony v. Smith*, 9 Humph. (Tenn.) 508.

³⁹ *Whicote v. Lawrence*, 3 Ves. 746.

⁴⁰ *Cooke v. Wilson*, 1 C. B. (N.

S.) 153; *Green v. Keppe*, 18 C. B. 149; *Deslandes v. Gregory*, 2 E. & E. 602; *Clayton v. Souther*, 1 Exch. 717; *Parker v. Winslow*, 7 El. & B. 492. A person who describes himself in an agreement to make a lease as making it on behalf of another will be personally liable if in subsequent part of it he promises that he will himself execute it. *Norton v. Herron*, 1 Car. & P. 648, R. & M. 229, 28 R. R. 797.

Rowe" or "for John Doe, Richard Rowe agent" all the words that follow after the name of the agent are treated as mere *descriptio personae*, and the lease or other writing will be binding on the agent individually upon the ground that he has not disclosed the name of his principal.⁴¹ But the principal and not the agent will be bound if it appear from the language of the lease itself that it was signed by the agent for the principal and not for the agent himself.^{41a} A person who, on being sued for rent of premises leased by him in his own name, claims that he was the agent of another in making the lease, will have the burden on him to convince the court of that fact.⁴² Thus an authorized agent who executes a lease under seal in which he states he is the agent of a disclosed and known principal, and who assumes to contract for such principal only and not for himself personally or individually is not bound by the lease personally or individually though he has signed his individual name.⁴³ So also, a lease which reads "We have leased to" a lessee named, and which is signed "L. and Son, agents for W." is the lease of the principal, and not of the agents.⁴⁴ And it has been held that the mere fact alone, that an agent executes a lease in his own name does not make him individually liable thereon, unless the language of the lease shows a clear intent that he shall be liable individually.⁴⁵ The fact that a lease is executed by an agent in his own name, does not alone necessarily render it invalid.⁴⁶ It is binding on the lessee who is estopped to show that the lessor, though styling himself an

⁴¹ *Compton v. Cassada*, 32 Ga. 428; *Fisks v. Eldredge*, 12 Gray (Mass.) 474; *Fowler v. Atkinson*, 6 Minn. 578; *Robertson v. Banks*, 9 Miss. 666; *McColgan v. Katz*, 29 Misc. Rep. 136, 60 N. Y. Supp. 291; *Bellas v. Hays*, 5 S. & R. (Pa.) 427, 436, 438; *Pryer v. Coulter*, 1 Bailey Law (S. Car.) 517, 520; *Kleckner v. Klapp*, 2 Watts & S. 44; *Robertson v. Pope*, 1 Rich. Law (S. Car.) 501; *Comb's Case*, 9 Rep. 76; *White v. Cuyler*, 6 T. R. 176; *Co. Litt.* 48c.

^{41a} *Magill v. Hinsdale*, 6 Conn. 464, 469; *Cook v. Sanford*, 3 Dana

(Ky.) 237; *Hall v. Woods*, 10 N. H. 237.

⁴² *Shakel v. Hennessey*, 57 Ill. App. 332.

⁴³ *Whitford v. Laidlaw*, 94 N. Y. 145, 149; *Kiersted, V. O. & A. R. R. Co.*, 69 N. Y. 343, 345, 25 Am. Rep. 199.

⁴⁴ *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. Rep. 1082.

⁴⁵ *Frambach v. Frank*, 33 Colo. 529, 81 Pac. Rep. 247.

⁴⁶ *Murray v. Armstrong*, 11 Mo. 209; *Potter v. Bassett*, 35 Mo. App. 417.

agent, had no title to the premises.⁴⁷ These rules apply also to a lease which is signed by an agent acting for an undisclosed lessee. Thus a lease signed by a person in the capacity of a lessee in his individual name, is binding on him individually, though it may be recited in the lease that he is acting for another. The lease is his individual lease and he and not his principal is liable on the covenant to pay the rent though the principal may have had the use and occupation during the term. The covenants in such a lease can be enforced only by or against the person who actually covenants though in fact he covenants for another's benefit and this fact is known to the lessor. Nor can he escape individual liability where he signs as an individual merely by showing he was authorized to sign the lease as an agent and that he intended to do so as an agent and not as a principal. For the intention of the parties under such circumstances is a question of fact and the presumption is that it was intended to be binding on the agent as an individual unless an express ratification by the principal is proved.⁴⁸ But, while parol evidence is not admissible to exonerate the agent of an undisclosed principal from his liability for rent on a lease where the liability of his principal on the covenants does not appear upon the face of the lease⁴⁹ such evidence is received to charge the principal upon a lease and to enable him to sue or to be sued thereon.⁵⁰ A tenant who has enjoyed the use and occupation of the premises, cannot defend in an action for the rent by showing that the lease was not signed by the landlord as the principal. Thus in an action against the tenant upon notes given for rent the defendant is estopped to show that the lease was not signed by the real owner, where the tenant had in fact signed the lease, and the real owner's agent had signed his name individually in place of that of the owner.⁵¹ So that a person who styles himself in the lease "sole lessor," and signs the lease with his own name, followed by the word agent is, so

⁴⁷ Bedford v. Kelly, 61 Pa. St. 491.

⁴⁸ Kiersted v. O. & A. R. R. Co., 69 N. Y. 343, 1 Hun (N. Y.) 151, 55 How. Prac. 51; Whitford v. Laidler, 25 Hun (N. Y.) 136, 140.

⁴⁹ Higgins v. Senior, 8 Mee. & Wel. 844.

⁵⁰ Higgins v. Senior, 8 Mee. & Wel. 844; Humphrey v. Dale, 7 E. & B. 266.

⁵¹ Lagerfelt v. McKie, 100 Ala. 430, 14 So. Rep. 281.

far as the lessee is concerned, the landlord and he alone can recover rent and distrain for the non-payment therefor.⁵² And generally an agent who has the full management of his principal's real estate with the power to rent it, may maintain an action for the possession of the premises where a tenant to whom the agent has leased it, fails to pay the rent.⁵³ A principal may ratify a lease which was executed by his agent as a lessor in such manner as to bind the agent only. After the principal has ratified the lease, he may sue upon any covenant⁵⁴ contained in the lease signed by his agent. A lease executed by the agent in which he exceeds the authority conferred upon him by the principal without the knowledge of the party with whom he is contracting though it may not bind the principal, is binding upon the agent. But when an agent acts in good faith and discloses to the other contracting party the extent of his real authority the lease will not be obligatory upon the agent in case it shall turn out that he has exceeded his authority.⁵⁵ For if the party contracting with him actually knows the extent of his authority and accepts a lease from him which is in excess of his authority, he must take the consequences.⁵⁶

§ 79. **Undisclosed principal where a lease is under seal.** The principal cannot maintain an action for rent on a covenant in a lease under seal which is executed by the agent only under the agent's seal and which does not disclose the fact that the principal is a party to it. An action upon such a sealed instrument must be brought by a party to it and can be brought by no other person. The agent who executes a lease under his own name and seal is alone responsible for he and not his principal has entered into the covenants and inasmuch as he alone can be held liable for the performance of these covenants it follows that he alone can enforce the obligations which are incumbent on the other party. Where the agent of the owner executes a lease under the name and seal of himself and not of his prin-

⁵² *Seyfert v. Bean*, 83 Pa. St. 450, 34 L. I. 213.

⁵³ *Hinckley v. Guyon*, 172 Mass. 412, 52 N. E. Rep. 523.

⁵⁴ *Brooks v. Cook* (Ala.), 38 So. Rep. 641.

⁵⁵ *Hamilton v. Clanricard*, 5 Bro.

P. C. 547; *Fenn v. Harrison*, 3 T. R. 758.

⁵⁶ *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Galewski v. Appelbaum*, 32 Misc. Rep. 203, 65 N. Y. Supp. 694.

principal he and not the owner is the proper person to bring an action for the rent.⁵⁷ The executor of an estate cannot sue on a lease executed under seal by an agent in the agent's name as lessor where the lease does not show who was the principal.⁵⁸ The contrary rule is recognized where there is a written lease not under seal. It may then be shown by parol that the principal and not the agent is the real party in interest and the undisclosed principal may sue as landlord to recover the rent.⁵⁹ But the fact that a lease is not required to be under seal does not always permit a lease actually under seal to be regarded as a simple contract and allow an undisclosed principal to sue thereon. Under some circumstances a seal may be treated as surplusage. Thus if it appear on the face of the sealed instrument itself that the lease was actually made on behalf of the principal and from parol evidence that he has derived a benefit from it, he may sue and be sued on it, though it has been signed only by the agent in his own name. The mere fact that an agent signs a sealed lease as agent not mentioning the name of the principal either in the signature or in any part of the lease is not enough alone to admit parol evidence of the existence of the principal or to permit the principal to sue thereon.⁶⁰

⁵⁷ *Schaeffer v. Henkel*, 75 N. Y. 378, 381, 7 Abb. N. C. 1; *Briggs v. Partridge*, 64 N. Y. 357.

⁵⁸ *McColgan v. Katz*, 60 N. Y. Supp. 291, 29 Misc. Rep. 136.

⁵⁹ *Bryant v. Wells*, 56 N. H. 152,

153; *Brooks v. Cook* (Ala.), 81 Pac. Rep. 247.

⁶⁰ *Manett v. Simpson*, 61 Hun, 620, 15 N. Y. Supp. 448. See *Hays v. Moody*, 2 N. Y. Supp. 385; *Hardy v. Williams*, 31 N. Car. 177.

CHAPTER V.

THE CHARACTER OF THE PROPERTY WHICH MAY BE LEASED.

- § 80. What may be leased.
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- 88. The lease of a portion of a homestead.
- 89. The mode of the execution of a lease of a homestead.

§ 80. What may be leased. At the common law not only land itself but all chattels and hereditaments, corporeal or incorporeal, might be the subject of a lease. Thus, an advowson¹ might be leased. So, also, corrodies,² estovers,³ ferries,⁴ fisheries,⁵ offices, franchises,⁶ rights to tolls, ⁷ rights of common,⁸ rights of way,⁹ and rights of herbage,¹⁰ may be the subject of a lease at common law. So, a stall in a market may be leased.¹¹ So, also, there may be a lease of the right to take herbage, timber or minerals from the land;¹² of water power,¹³ and of the privilege of putting up advertising signs upon a wall,¹⁴ all of which

¹ Anonymous, 3 Dyer, 323, b. pl. 30.

² Bacon's Abr. tit. Leases (A).

³ Bro. Abr. tit. Leases, 40; Bacon's Abr. tit. Leases (A); 1 Platt on Leases, 24.

⁴ Peter v. Kendal, 6 B. & C. 703, 711; Hansen v. Kirtley, 11 Iowa, 565.

⁵ Duke of Somerset v. Fogwell, 5 B. & C. 875, 884; Eastham v. Anderson, 119 Mass. 526, 530; Watertown v. White, 13 Mass. 477.

⁶ 2 Inst. 221, 406.

⁷ Harris v. Morrice, 10 M. & W. 260.

⁸ Luney v. Brown, Lutch. 99.

⁹ Newmarch v. Brandling, 3 Swanst, 99; Osborn v. Wise, 7 C. & P. 761, 764.

¹⁰ Hill v. Barry, Hayes & Jo, 688.

¹¹ Washington Market Co. v. Hoffman, 101 U. S. 112, 25 L. Ed. 782.

¹² Maring v. Ward, 50 N. Car. 272, 275.

¹³ Channel v. Merrifield, 206 Ill. 278, 69 N. E. Rep. 32.

¹⁴ Landau v. O. J. Gude Co., 84 N. Y. Supp. 672.

are distinct from a lease of the land itself and do not pass any interest in the land except to occupy it temporarily within the limits of the authority expressly conferred.

§ 81. **A lease of land held adversely.** At the common law an actual or constructive possession of the land by the lessor is always required as the basis of a lease. Hence, it follows that a lease *in presenti* creating a right to an immediate possession in the lessee, executed and delivered while the premises demised are in the adverse possession of a third person is absolutely void.¹⁵ So far as the validity of the lease is concerned it does not matter whether the adverse possession has or has not ripened into a title, or whether the lessor knew of the adverse possession or not.¹⁶ In some cases by statute it is provided that property held adversely may be transferred. Such a statute validates a lease of property in the adverse possession of another than the lessor.¹⁷ A lease by a person against whom property is held adversely to the person who claims title against him is valid. The execution of the lease puts an end to the adverse possession because by it the occupant admits its ownership to be in the lessor which he will be subsequently estopped to deny.¹⁸ But the rule that land held adversely cannot be the subject of a valid lease at the common law does not apply to the case of a lease which is to take effect as soon as another lease which is then in existence shall terminate. The rule does not apply to leases in reversion. The possession of the tenants is then not adverse to the landlord. During the possession of the first tenant the lessee under the lease in reversion is the owner of an *interesse termini* which vests in possession at the expiration of the earlier lease. This lease may be granted with or without a deed.¹⁹ Unless the common law rule is superseded by a statute the only mode by which one whose land is held adversely may lease it is by the execution of a lease and the delivery of it in escrow to a third person with a power of attorney to make an

¹⁵ *Iseham v. Morrice*, Cro. Car. 109.

¹⁶ *Sohier v. Coffin*, 101 Mass. 179, 183. See *Warner v. Bull*, 13 Met. (Mass.) 1.

¹⁷ *Lewis v. Brandle*, 107 Mich. 7, 9; *Rice v. Whitmore*, 74 Cal. 619,

623, 16 Pac. Rep. 5011, 5 Am. St. Rep. 479.

¹⁸ *Abbey, etc., Ass'n v. Welland*, 48 Cal. 614.

¹⁹ *Winter v. Loveday*, 2 Salk. 537; *Clarges v. Funucan*, 2 Doug. 565, 568; *Smith v. Day*, 2 M. & W. 684, 699.

entry upon the land and to deliver the lease to the lessee after the entry and while in actual possession. The common law authority regulating this method of procedure will be found in the notes.²⁰ A lease for years executed by an heir after the death of his ancestor but before his own actual entry on the land which is required to vest him with the possession at the common law is valid. The law presumes that he is in possession the instant the ancestor dies. If, however, a stranger to the title actually enters before the heir takes possession and sets up an adverse possession to the heir, the lease of the heir will be void at common law.²¹

§ 82. **Leases of public land.** Vacant or unappropriated public land which is owned by the state or the United States and which is subject to pre-emption by settlers cannot be leased in the absence of a statute permitting it.²² In some States the leasing of public land by the state or the county is permitted by statute. A lease which is contrary to the statute is invalid and passes no title to the lessee. The invalidity of the lease is absolute and beyond the effect of subsequent curative statutes.²³ The statutory provisions regulating the leasing of public land have for their object either the prohibition of the making of leases by the public authorities or the prohibition of the making of leases by the claimants of the land. In the absence of an express statutory prohibition a lease of public land which is executed by a claimant to it before his entry has been perfected by him, is valid. If the title has been perfected in the claimant and he has occupied the land he will unquestionably have the same right to lease it as any other owner,²⁴ but if it appears to be the intent of the parties to the lease that the lessee of the claimant shall enter upon the land and occupy it under the lease before the title of the claimant has been confirmed or perfected according to law it is very doubtful if the lease would be obligatory on the claimant who subsequently enters

²⁰ 4 Bacon's Abr. tit. Leases (H) 4; Co. Litt. 48b; Sharp v. Sharp, Cro. Eliz. 483; Stephens v. Eliot, id. 484; Jennings v. Bragg, id. 447; Davis v. Bridges, 2 Roll's Abr. 25.

²¹ Comyn's Digest, tit. Seizin (A), Sheppard's Touchstone, 269.

²² Turner v. Ferguson, 33 Tex. 505, 508, 509.

²³ Sexton v. Board of Sup'rs of Coahoma, 86 Miss. 380, 38 So. Rep. 636.

²⁴ Tiernan v. Miller, 69 Neb. 764, 96 N. W. Rep. 661.

and attempts to repudiate the lease.²⁵ Where a lease by a patentee of public land who has entered upon it is valid, his lessee has the same rights during the term to the possession and enjoyment of the land as has any other tenant.²⁶

§ 83. **The lease of land or houses with chattels to be used therewith.** In England the validity of leases of chattels is admitted. Thus a lease of a dwelling house and the furniture or of a mill and the machinery in it is valid. During the term for which chattels are leased the tenant has an interest in them as will deprive the owner or landlord of his possession of them. The relation of the landlord to the chattels is precisely the same as the relation of the landlord of the land to the demised land. By the execution of the lease for a term the landlord is prevented from bringing an action against a third party for any injury to the chattels during the term which does not amount to a permanent destruction of them. This rule has been applied to leases of furnished houses. Thus, where the landlord of a house demises it furnished to a tenant, and the furniture of the house belonging to the landlord but in the actual possession of the tenant is taken from the house on an execution against the tenant, the landlord cannot recover in trespass for the goods against the sheriff though the sheriff knew that the landlord owned the furniture. For in this case the injury is not to the landlord but to the tenant by depriving him of the use of the furniture.²⁷ And the tenant may therefore sue. Nor can a landlord under such circumstances where the chattels which he has leased to a tenant are taken by a third person maintain an action of trover or conversion to recover the chattels for the right to the possession of the chattels continues in the tenant during the term, and the only action which the landlord may maintain during the term in regard to the chattels is an action for the destruction or their substantial and permanent impairment.²⁸

²⁵ *Orrell v. Bay Mfg. Co.* (Miss. App., 1906), 40 So. Rep. 429.

²⁶ *Tiernan v. Miller & Leith*, 69 Neb. 764, 96 N. W. Rep. 661.

²⁷ *Ward v. Macauley*, 17 R. 480.

²⁸ *Gordon v. Harper*, 7 T. R. 9. In this case the court said: "The very statement of the proposition

affords an answer to it. If, instead of the household goods, the goods here taken had been machines used in manufacture which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against

One who leases a farm together with the live stock, farming tools, and other articles to be used therewith and binds himself to return these articles of personal property or others of equal value at the end of the term, acquires thereby no absolute title to the personal property. His creditors have no claim to these articles of personal property as against the landlord, though the tenant may use the personal property during the term and may also sell it providing he shall return property of equal value at the end of the term. Under these circumstances, it will be necessary at the expiration of the term, whether by lapse of time or otherwise, for the landlord or the tenant to determine by an agreement between them, or by some proceeding of an equitable nature, who owns the personal property then on the farm. On the other hand, an agreement as to the ownership of such property may be implied from the lan-

the tenant, and the creditor would have been entitled to the beneficial use of the property during the term; the difference of the goods, then, cannot vary the law. The cases which have been put at the bar do not apply; the one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said, that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the trees when growing, and by the very act of felling it, his right is absolutely determined; and even then the property does not vest in his immediate landlord, for if he has only an estate for life, it will go over to the owner of the inheritance. Here, however, the tenant's right of possession during the term cannot be divested by any wrongful act, nor can it thereby be revested in the landlord. I forbear to deliver any

opinion as to what remedy the landlord has in this case, not being at present so called upon to do; but it is clear that he cannot maintain trover." Ashurst, J., said: "I have always understood the rule of law to be, that in order to maintain trover, the plaintiff must have a right of property in the thing and a right of possession, and that unless both these rights concur the action will not lie. Now, here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not probable that the furniture can be of any use to any other than the actual tenant of the premises; but supposing the things leased had been manufacturing engines, there is no reason why a creditor seizing them under an execution should not avail himself of the beneficial use of them during the term."

guage of the lease, or the conduct of the parties. If, for example, the landlord attaches the stock and farming implements on the farm as the tenant's property when the lease is forfeited and a trustee of the tenant, or the tenant himself, or his creditors sue the landlord for conversion it may reasonably be implied that the parties had agreed that the personal property belonged to the tenant.²⁹ Where the lessor delivers to the lessee certain movable personal property, as stock, feed or utensils on a farm, which are to be used by the lessee in connection with his occupation of the leased premises, and for the benefit of the lessee, with a proviso that the personal property is to be returned at the end of the term a bailment or lease of the personal property is created and not a sale. The right of the lessee to the possession of the personal property during the term is paramount to the right of the lessor and, *a fortiori* to the right of an attaching creditor of the lessor. The property cannot legally be taken out of his possession as his right thereto is perfect and absolute but only for the term.³⁰ One who hires a furnished house must determine for himself what articles of furniture he shall claim as within the lease. It is his duty when the lease is executed to make a personal examination of the premises in order to ascertain what furniture is contained therein, and, in the absence of an agreement to the contrary, it will be presumed that by the lease of a house together with the furniture therein the tenant takes only the furniture that is actually contained in the house at the execution of the lease. A lease of a house with the furniture therein raises no implied covenant on the part of the landlord that the house is completely furnished. Nor can the tenant prove by parol evidence that the landlord orally promises to supply any deficiency in the furniture.³¹

²⁹ *Wilson v. Griswold*, 79 Conn. 18, 66 Atl. Rep. 783.

³⁰ *Smith v. Niles*, 20 Vt. 315, 320, 49 Am. Dec. 782. See note 1 *Dyer*, 767.

³¹ *Wilson v. Deen*, 74 N. Y. 531. In this case an offer of evidence by the tenant that the landlord orally promised at the time of the execution of a written lease to

supply all deficiencies in the furniture was rejected. The tenant never went into possession, but sued to have the lease cancelled for fraud or reformed on the ground of mistake, and the court held that he was entitled to no relief, no fraud or mistake being shown.

§ 84. **Lease of surplus waters of canals.** In many of the states it is by statute provided that a private corporation or the State itself controlling and operating a canal may lease the use of the surplus water which accumulates in, and which is not required for the operation and maintenance of the canals. Where a lease of this sort is made the lessor reserving the right to resume the possession of the water when it is needed for navigation, the lessee takes the lease subject to the implied right of the State to discontinue its canals whenever the legislature deems it expedient to do so.³² So generally even though by express reservation of this sort may be inserted in the lease, the lease so-called is in law a mere license to use the surplus water, and hence without any obligation on the part of the State to create or to maintain a surplus of water. The abandonment of the canal as a canal imposes no liability for damages on the State for the agreement is a license and it is hence revocable, unless an express provision be inserted to the contrary.³³ For canals are authorized, constructed and maintained by the State for public purposes only and as an aid to the farming and mercantile classes of the community in forwarding heavy freight cheaply from one part of the state to another. They are not primarily designed to afford cheap water power to be leased or sold for use by private persons or corporations. Hence the latter use is subordinate to the general public use for traffic, and the right to this private use may be terminated by the State whenever, in the exercise of its discretion, it abandons or relinquishes the primary and public use.³⁴

³² Fox v. City of Cincinnati, 104 U. S. 743, 26 Law ed. 928; Wabash, etc., Canal Trustees v. Butt, 25 Ind. 49; Armstrong v. Pennsylvania R. Co., 38 N. J. Law, 1; Hop-pock v. United New Jersey R., etc., Co., 27 N. J. Eq. 286; Buckingham v. Smith, 10 Ohio, 288; Cooper v. Williams, 4 Ohio, 253, 22 Am. Dec. 745, 5 Ohio, 391, 24 Am. Dec. 299; Kankauna Water Power Co. v. Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004.

³³ Fox v. City of Cincinnati, 104

U. S. 743, 26 Law Ed. 928; Fish-back v. Woodruff, 51 Ind. 102; Hoagland v. New York, C. & St. L. Ry. Co., 111 Ind. 443, 13 N. E. Rep. 472, affirming, 111 Ind. 443, 12 N. E. Rep. 80; Hubbard v. City of Toledo, 21 Ohio St. 379; Commonwealth v. Pennsylvania R. Co., 51 Pa. St. 351.

³⁴ Little Miami Elev. Co. v. City of Cincinnati, 30 Ohio St. 629, where an abandoned canal was by a municipal corporation converted into a highway. A statute authorizing payment for the damage

If the lease of surplus water expressly permits a resumption of the water whenever in the opinion of the State officials the lease shall cease to be of advantage to the State, no reason need be given for the action of the officials³⁵ in resuming the use of the water nor is the lessee entitled to compensation or damages. And where a statute provides that every lease of surplus canal waters shall contain a reservation to the lessor of the privilege of resuming the use of such water wherever it is necessary to do so an agreement by State officials with the lessee, that when he is deprived of the use of the water under this reservation the State shall compensate him for his permanent erection of mills or the like is invalid as a contract tending to retard or prevent the proper performance of official duty.³⁶ Hence under such a lease a lessee who builds dams, mills or factories cannot recover the value of the same when the lease is unexpectedly terminated by the State. Successive lessees of the power to be derived from surplus water of a canal not required for the use and operation of the canal, must, in case the surplus becomes inadequate to supply all of them sufficiently, be supplied in the order of the execution of their leases.³⁷ in point of priority in time according to the dates on which their respective leases were executed.³⁸

which has been caused by the state resuming leased surplus water of a canal does not apply to a lease permitting a revocation or resumption without payment of damages. *Ex parte Miller*, 2 Hill (N. Y.) 418.

³⁵ *Ex parte Miller*, 2 Hill (N. Y.) 418; *Mattoon v. Munroe*, 21 Hun (N. Y.) 474.

³⁶ *State v. Board of Public Works*, 42 Ohio St. 607.

³⁷ *Wabash & E. Canal Trustees v. Reinhart*, 22 Ind. 463.

³⁸ Usually the state or a company operating a canal is not regarded as bound to lease surplus water to all applicants in the absence of statute requiring it. *Buiney v. Chesapeake, etc. Canal Co.*, 8 Pet. (U. S.) 201, 8 Law.

ed. 917. If, however, a company owning a canal has been holding the canal out as a source of water supply for power and expensive manufacturing establishments have been erected along the banks of the canal in reliance on obtaining power, the company, in equity, may be compelled to lease its surplus water, if it be reasonably within its power to do so. *Millers v. Augusta*, 63 Ga. 772. In one case it was held to be the clear duty of the state to lease certain water of a state-owned canal where the legislature of the state had provided that the contractors who had dug it were to be paid out of the rents of the water-power. *French v. Gapen*, 105 U. S. 509, 26 Law Ed. 951.

§ 85. **Leases by a tenant in dower or curtesy.** Inasmuch as the right of dower is during the lifetime of the husband and until dower is assigned to the widow a mere personal right and confers no estate in the land, it is not capable of being leased.³⁹ However, after dower has been assigned to her, a widow may lease the land which she holds in dower for a term or for her life. The rights of the lessee of the widow are the same as the rights of any lessee of any tenant for life. It has been held that a covenant contained in a so-called lease of the right to have dower assigned by which the tenant agrees to pay the widow rent in consideration of her forbearing to exercise her right to dower, is a personal covenant. Hence, it does not run with the land so as to bind the tenant's assignee. Nor is the widow's contract a release of her dower if it is merely an agreement on her part to forbear asserting her dower for a certain time.⁴⁰ The tenant of an estate by the curtesy may execute a lease to the same extent as a tenant of any other life estate. Where the husband during the lifetime of the wife with or without her consent, leases her land for a term, the vesting in him of the estate by the curtesy will validate his lease to the extent that the term is unexpired. But, if before the death of the wife the husband makes a lease of her land in his own name and agrees to confer the possession on the lessee when the lessor shall become a tenant by the curtesy the future lease is subject to being defeated by the act of the wife in conveying or devising to another than her husband her real property,⁴¹ as a result of which the husband's estate by the curtesy is defeated.

§ 86. **Agricultural leases in New York.** In New York, prior to the constitutional provision which we are now to discuss, a very large portion of the manorial lands were leased in fee, or for very long terms, by their proprietors reserving an annual rent in money, produce or services. As the population increased and farming became widespread it was very soon apparent that such a mode of land tenure was unfavorable to progress for the tenants, owning only the usufruct, subject at any moment to be forfeited by breach of condition, felt none of the pride of in-

³⁹ *Chicago, B. & D. Ry. v. Kelly*,
221 Ill. 498, 77 N. E. Rep. 619;
Hyatt v. O'Connell, 130 Iowa, 567,
107 N. W. 599.

⁴⁰ *Croade v. Ingraham*, 13 Pick.
(Mass.) 33, 35, 36.

⁴¹ *Porch v. Fries*, 18 N. J. Eq.
204, 209.

dependent ownership and had no desire or incentive to improve or even to cultivate in a husbandlike manner, land which was liable at any time to pass from them or their heirs without compensation. To remedy this evil the framers of the constitution of 1846, abrogated such tenures and provided furthermore "that no lease or grant of agricultural land for longer period than twelve years, thereafter made, in which should be reserved any rent or service of any kind, should be valid." The rents or services mentioned are only such as are certain and periodical and issue out of the land and are paid for its use. Construing the New York statute some of the cases have held that a lease for more than twelve years is void *in toto*.⁴² Other cases have held that the lease is good for the period limited by the statute or constitution but that it is void as to the excess of the term over that period.⁴³ So a lease of farm land for twelve years or a covenant to renew every twelve years during the life of a landlord is void except as to the first twelve years.⁴⁴ A lease of farm land for twelve years to commence at the expiration of a prior term of eight years is invalid.⁴⁵ Where a tenant holding farm land under a valid unexpired lease surrendered it and then executes two leases, one for eight and one for twelve years to run successively, the two leases are construed together as one lease and both are invalid. But the fact of their invalidity does not revive the valid lease which has been surrendered.⁴⁶ The statutes and constitutional prohibition do not apply to life estates or to leases for life as they are for an indefinite period depending for their duration wholly on the contingency of death, though they may possibly exceed twelve years in duration.⁴⁷ For as a general rule in order that the lease shall be void it must in fact extend beyond the twelve year period. The possibility that it may extend beyond the period is not

⁴² Odell v. Durant, 62 N. Y. 524; Clark v. Barnes, 76 N. Y. 301, 32 Am. Rep. 306.

⁴³ Hart v. Hart, 22 Barb. (N. Y.) 606; Robertson v. Hayes, 83 Ala. 290, 3 So. Rep. 674; Parish v. Rogers, 20 App. Div. 279, 46 N. Y. Supp. 1058.

⁴⁴ Becker v. De Forest, 1 Sweeney, 528; Hart v. Hart, 22 Barb.

(N. Y.) 606, 14 How. Pr. (N. Y.) 418.

⁴⁵ Clark v. Barnes, 76 N. Y. 301, 304, 32 Am. Rep. 706.

⁴⁶ Clark v. Barnes, 76 N. Y. 301, 304, 32 Am. Rep. 706.

⁴⁷ Parish v. Rogers, 20 App. Div. 279, 46 N. Y. Supp. 1058; Wegner v. Lubenow, 12 N. D. 95, 95 N. W. Rep. 442, 445.

sufficient.⁴⁸ A statute which limits the duration of leases in which rent or service is reserved does not apply to a life estate for which a gross sum is paid. The terms of the statute as they are restrictive of the free alienation of landed property will not be extended by construction. The terms "rent or service" will be construed in their strict and technical sense. Rent is usually a profit arising out of the income or yearly profits of land, and differs from a lump sum paid as the consideration for the transfer of an estate in land. Hence a life lease for which no rent is to be paid is not void under the statute though the consideration for it be paid in instalments or consist of services so long as the payment or rendition of services be not made by way of rent.⁴⁹ A lease of agricultural land is within the prohibition though the land is leased for other than agricultural purposes, for it is the character of the land, not the purpose of its use which determines the validity of the lease.⁵⁰

⁴⁸ In *Parish v. Rogers*, 20 App. Div. 279, 46 N. Y. Supp. 1058, it is said: "A particular prohibition upon the free alienation of property cannot be extended or enlarged beyond the terms in which the restriction is expressed by the application of any rule of liberal interpretation. On the contrary, the provision must be made to bear a restrictive interpretation, and be limited in its operation and effect by the language employed. If we hold that an estate for life is *per se* an estate exceeding twelve years in duration, and therefore void, it follows that such estate in agricultural lands, with a reservation of rent, are entirely abrogated and the owner of property is prohibited from creating such an estate either for his own life or that of another. . . . The purpose of the constitution was not to interdict the creation of such estates, but to limit the time beyond which they shall not extend. Where the time is speci-

fied in the lease and exceeds the limit it is void *per se*, but where it is left indefinite, and its termination depends upon the contingency of death, which may happen within the period of limitation, it cannot be said to be void *ipso facto*, as being made for a period longer than twelve years."

⁴⁹ *Stephens v. Reynolds*, 6 N. Y. 454; *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. Rep. 442, 444; *Parsell v. Stryker*, 41 N. Y. 480. The lease "must reserve rent, as rent, payable at stated periods, and a grant or lease of land for life or for a long term of years, for a specified consideration, whether payable in instalments or at one time is not such a lease." *Parsell v. Stryker*, 41 N. Y. 480.

⁵⁰ *Odell v. Durant*, 62 N. Y. 524, 525. In Maryland by Acts 1884, page 649, chapter 485, it is provided that all leases for a period in excess of fifteen years shall be redeemable at the option of the tenant on his paying a sum of

§ 87. **The power to lease a homestead.** The occupant of real estate which is exempt from a sale under execution by a statute because it is claimed to be the homestead of the occupant may execute a valid lease of all or of a portion of the same to the same extent as the owner of any other sort of real estate. This rule is subject to the exception that where the owner of the homestead is a married man it is usually necessary that his wife shall join in the lease. As between the homesteader and his lessee the validity of the lease cannot be questioned by either on the ground that the premises are the homestead of the lessor. This rule has been so well recognized that there are few, if any, direct adjudications upon it. Assuming the lease itself is valid as between the parties to it, the question remains to be considered, to what extent third parties are affected by it. In other words, the question is to what extent does the leasing of a homestead by the owner and its actual occupation thereafter by the lessee constitute an abandonment or a waiver of the homestead privilege by the lessor so far as the rights of his creditors are concerned? The waiver or abandonment of a homestead exemption once established in good faith is largely a matter of intention depending on the circumstances in any particular case. Some sort of an occupancy by the homesteader is essential to the existence of the exemption. But actual occupancy of the whole tract embraced in the exemption is not required. This is often impracticable or very inconvenient, particularly in the case of farm land or land which is located in the country. Hence a constructive occupation and use as a homestead has often been held sufficient if the homestead claim continues to be maintained in good faith. A temporary absence although it may be prolonged for months and perhaps years, is not of itself alone an abandonment of the right and the fact that a portion and even the whole of the land is rented does not destroy the homestead exemption unless the statute expressly or by necessary

money which is to be fixed under rules therein set forth. The object of the statute was to abolish long leases which it was believed were injurious to the prosperity of the city of Baltimore. *Stewart v. Garter*, 70 Md. 242, 16 Atl. Rep. 644, 2 L. R. A. 711. The statute

being remedial must be liberally construed. Its provisions cannot be waived by the consent of the parties. It applies to land which is to be built upon as well as to land which has buildings on it. *Swan v. Kemp*, 55 Atl. Rep. 441, 443, 97 Md. 686.

implication requires an actual occupancy by the homestead claimant.⁵¹ Accordingly it has been held that the leasing of land which was claimed to be the homestead of an old man whose extreme age and illness compelled him to reside with one of his children elsewhere,⁵² or the leasing of the homestead by a person who, for reasons of his own, had temporarily removed therefrom⁵³ but intended subsequently to return thereto⁵⁴ cannot be regarded as an abandonment of the homestead and hence will it not subject the premises to be levied on under an execution.⁵⁵

⁵¹ *Hixon v. George*, 18 Kan. 253; *Bank v. Warner*, 22 Kan. 537; *Garlinghouse v. Mulvane*, 40 Kan. 428, 19 Pac. Rep. 798; *Shirack v. Shirack*, 44 Kan. 653, 24 Pac. Rep. 1107. See, also, as sustaining the text, *Scaife v. Argall*, 74 Ala. 473; *Metcalf v. Smith*, 106 Ala. 301, 17 So. Rep. 537; *Fuller v. Whitlock*, 99 Ala. 411, 13 So. Rep. 80; *Hines v. Duncan*, 79 Ala. 112, 58 Am. Rep. 580; *Gates v. Steele*, 48 Ark. 539, 4 S. W. Rep. 53; *Simpson v. Biffle*, 63 Ark. 289, 38 S. W. Rep. 345; *Dallemand v. Mannon*, 4 Colo. App. 262, 35 Pac. Rep. 679; *Simonson v. Burr*, 121 Cal. 582, 54 Pac. Rep. 87; *Stewart v. Brand*, 23 Iowa, 477; *Sibley v. Lawrence*, 46 Iowa, 563; *Pitney v. Eldridge*, 58 Kan. 215, 48 Pac. Rep. 854; *Dulanty v. Pynchon*, 6 Allen (Mass.), 510; *Earl v. Earl*, 60 Mich. 30, 26 N. W. Rep. 822; *Spratt v. Early* (Mo.), 69 S. W. Rep. 13; *Locke v. Rowell*, 47 N. H. 46; *Wetz v. Beard*, 12 Ohio St. 431; *Hancock v. Morgan*, 17 Tex. 582; *Newron v. Calhoun*, 68 Tex. 451, 4 S. W. Rep. 645; *C. B. Carter Lumber Co. v. Clay* (Tex. 1888), 10 S. W. Rep. 293; *H. P. Drought & Co. v. Stallworth* (Tex. 1907), 100 S. W. Rep. 188. *Contra*, *Benson v. Aitken*, 17 Cal. 163; *Burson v. Dow*, 65 Ill. 146; *Smith v. Bunn*, 75 Mo. 559;

Warren v. Patterson, 32 Neb. 727, 49 N. W. Rep. 703.

⁵² *Gates v. Steele*, 48 Ark. 539, 4 S. W. Rep. 53.

⁵³ *Stewart v. Brand*, 23 Iowa, 477.

⁵⁴ *Hixon v. George*, 18 Kan. 253; *Dulanty v. Pynchon*, 6 Allen (Mass.) 510; *Earl v. Earl*, 60 Mich. 30, 26 N. W. Rep. 822; *Wetz v. Beard*, 12 Ohio St. 431; *Hancock v. Morgan*, 17 Tex. 582; *Hines v. Nelson* (Tex. Civ. App.), 24 S. W. Rep. 541.

⁵⁵ In Alabama, Code 1876, section 2843, provides that the leasing of a homestead for a period of more than twelve months at any one time shall be deemed an abandonment of it. Under this statute a lease for twelve months, with a new lease to begin at its expiration, is an abandonment of the homestead. *Scaife v. Argall*, 74 Ala. 473. In California the leasing of the homestead after the death of the wife of the occupant, upon an agreement by the lessee to keep the occupant's infant child, is an abandonment of the homestead, though some furniture was left in the house and the debtor, after his remarriage, reoccupied the premises. *Benson v. Aitken*, 17 Cal. 163. In Texas where the plaintiffs rented, for a few months,

§ 88. **The lease of a portion of a homestead.** Premises which are occupied by a person who has made and filed a declaration that they are his homestead, are no less his homestead, because he leases a portion of them to another party while continuing to occupy the remainder himself.⁵⁶ Hence where the occupant of a homestead leased a barn on his premises, and temporarily left his residence there, he did not lose the homestead exemption as to the ground covered by the barn, though the statute in terms required that the premises shall not only be owned but also occupied by the claimant as a homestead.⁵⁷ So the owner of a homestead consisting of a farm, who fences off a portion of it, and leases it for a term with the privilege of a renewal for another term does not by his lease and the separation of one part of the farm from the other, lose his exemption as to either portion.⁵⁸

their city home, which they had occupied for a number of years as a homestead, and went to live on a ranch, but with no intention of abandoning their city home, to which they soon returned, such temporary lease does not constitute an abandonment. *Hines v. Nelson* (Tex. Civ. App.), 24 S. W. Rep. 541. In Wisconsin it has been distinctly held that a debtor who removes from his homestead, without any intention of acquiring another elsewhere, for temporary purposes merely, or from some necessity, and with the intention of returning again to occupy the same as and for his homestead as soon as circumstances will allow, does not forfeit or lose the exemption of the same from sale on execution, though he should, while absent therefrom, rent it to a tenant. *Herrick v. Graves*, 16 Wis. 157. In New Hampshire nothing short of a voluntary abandonment of a homestead, so understood by all the parties, will divest the estate

in the homestead; and no inference of an intent to abandon the homestead will be made from a lease of the premises for one year at a time by the person holding the homestead right when the intention to retain the residence is clearly evidenced by other facts. *Locke v. Rowell*, 47 N. H. 46.

⁵⁶ *Bailey v. Dunlap*, 138 Ala. 415, 419, 35 So. Rep. 451; *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. Rep. 404; *Maroney Hardware Co. v. Connelles* (Tex. Civ. App. 1894), 25 S. W. Rep. 448; *Prufrock v. Joseph* (Tex. Civ. App. 1894), 27 S. W. Rep. 264.

⁵⁷ *Guy v. Downs*, 12 Neb. 532, 12 N. W. Rep. 8.

⁵⁸ *Pitney v. Eldredge*, 58 Kan. 215, 48 Pac. Rep. 854. The fact that an owner does not exclusively occupy an entire homestead does not destroy the exemption. A part may be used for other purposes than a homestead where the whole amounts to but one tract of land not exceeding the area permitted to be exempt under the law. And

§ 89. The mode of the execution of a lease of a homestead. The statute usually requires that both husband and wife must join in a deed of conveyance affecting a homestead except where the deed of conveyance is executed as a security for the purchase price. In the latter case the signature of the husband is sufficient. Usually the husband has no power of encumbering the homestead by a lease or other conveyance without the signature of his wife. In Texas the lease of a homestead for a term, with the privilege of an indefinite renewal which is not signed and separately acknowledged by the wife, has been held as invalid.⁵⁹ A statute which requires the wife to join in the execution of the conveyance of the homestead is mandatory. It follows necessarily that an instrument which purports to affect or to encumber the homestead in which the wife has not joined is invalid as to her. Her privileges in the homestead will be reserved as against the holder of the void conveyance and it is not material under the statute that the title to the homestead is in the husband alone for any conveyance by him which confers a possession which interferes in any way with the enjoyment of the premises by the wife as a homestead is invalid.⁶⁰ Circumstances may arise, however, where the wife will be estopped

where the part which is claimed to be not a part of the homestead has not been totally abandoned as a part thereof by making it, for instance, another person's homestead, or by using it or permitting it to be used in some other way inconsistent with the homestead, it is still a homestead. Thus, to show that property though leased is still a homestead it may be proved that rent was to be paid in six month instalments and a default in the payment of any of the instalments entitled the owner of the homestead to re-enter. So, under the lease he was entitled to go on the land to see that waste was not committed and that the covenants in the lease were performed. Actual and continuous oc-

cupancy of the entire farm is not essential, and the circumstance that the tenant cultivated the part leased to him in the same manner as his lessor is very material in showing that there has been no abandonment of the homestead. *Bebb v. Crowe*, 39 Kan. 342; *Huffman v. Hill*, 47 Kan. 613.

⁵⁹ *Southern Oil Co. v. Colquitt* (Tex. Civ. App.), 69 S. W. Rep. 169. See, also, *Williams v. Galveston* (Tex. Civ. App.), 58 S. W. Rep. 551.

⁶⁰ *Hosteller v. Eddy*, 128 Iowa, 401, 104 N. W. 485; *Coughlin v. Coughlin*, 26 Kan. 116, 118; *Kloke v. Wolf* (Neb. 1908), 111 N. W. Rep. 134; *Wea Gas, etc., Co. v. Franklin Land Co.*, 54 Kan. 533, 535, 38 Pac. Rep. 790.

to assert the invalidity of a lease of a homestead which was executed without her joining in it. Her acquiescence after she knows of the execution of the lease and with knowledge of the occupation by the tenant, and of his cultivation of the land as a tenant after the lease had been signed may all be proved, and, if it appears equitable from her silence and her conduct that the lease should be supported, the court may act accordingly. If, for illustration, the tenant, relying upon the wife's silence and failure to object, shall have planted a crop which is about to be reaped when the wife raises the question of the validity of the lease, it is very likely that the court would not declare the lease void in an action by the wife against the tenant without compelling her to compensate the tenant for the value of the crop.⁶¹

⁶¹ Johnson v. Samuelson, 69 Kan. 263, 76 Pac. Rep. 867.

CHAPTER VI.

TENANCY FROM YEAR TO YEAR.

- § 90. The origin of tenancy from year to year.
- 91. The continuity of the several yearly periods.
- 92. The use of express language in creating a tenancy from year to year.
- 93. The character of the cultivation of the land as determining the period of the tenancy.
- 94. The payment of a yearly rent as creating a tenancy from year to year.
- 95. The effect of the death of either party upon a tenancy from year to year.
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- § 116. The statutory regulation of the notice to quit in tenancies from month to month.
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- 128. The withdrawal of a notice to quit.
- 129. The waiver of a notice to quit by the receipt of rent
- 130. When a notice to quit may be dispensed with by a surrender.
- 131. A disavowal of the landlord's title by the tenant may dispense with giving a notice to quit by the landlord.

§ 90. **The origin of tenancy from year to year.** The relation of landlord and tenant in a hiring or a tenancy from year to year unquestionably had its origin in the reluctance of the English courts to enforce the arbitrary will of the landlord in determining estates at will and in their desire to protect the rights of the tenants to their crops growing on the land upon the determination of the estate. The precarious and uncertain character of the tenure which was at the will of the landlord and the inducement which this tenure offered for the landlord to terminate it without notice because of which a tenant of agricultural land might be unjustly deprived of the fruits of his industry in sowing and cultivating the land appealed to the courts. The tenancy from year to year is the offspring of tenancy at will which in early times was almost the sole tenancy recognized. In the quaint language of the early law the tenancy from year to year was substituted for the vague and uncertain tenancy at will to uphold and effectuate the just maxim that he "who sows, may reap."¹ Hence so long ago as the time of the year books, a general occupation of land no time or

¹ This desire to secure to the tenants the crops which were growing on his land at the termination of the tenancy at will very

early gave rise to the doctrine of emblements which still endures. Litt. § 68.

duration of the tenancy being mentioned was by implication and in favor of the cultivation of the soil construed by the common law judges to be a tenancy from year to year and that the tenancy could not be determined and the tenant put out of his land without a reasonable notice by the landlord of his intention to terminate the tenancy, which notice was very early required to be given at least six months before the termination of any year.²

§ 91. **The continuity of the several yearly periods.** On a mere cursory examination of the tenancy from year to year it would seem that each annual term constitutes a separate and distinct estate or term. Though this is true in fact the law considers the several yearly terms as merged as soon as two or more of them have passed and the law then looks forward to each future recurring year as it arrives as a separate term only until it is consolidated with those which have preceded it. Every year after the first is a springing interest or estate arising from and based on the first annual term, assimilating to it and soon to become a parcel of it. But on the other hand each recurring yearly tenancy is for a separate period so that the term may be pleaded against the tenant as commencing with the first day of the current year though the tenant has in fact occupied the premises for several years previously thereto.³ It may be said however that, though the lessor may adopt this course in pleading, it is not compulsory upon him to do so. He may declare on the demise from year to year either as a new demise or as a part of an old contract. So, it has been said that if a tenant from year to year shall hold for two years or more either he or his landlord may then plead the lease as having been made for so many years from the date of its original making of the lease.⁴ So too at common law in the case a tenant from year to year holding over and dying during the third year of his tenancy, it was held that the landlord might, even after his tenant's

² See remarks of Lord Kenyon in *Martin v. Watts*, 7 T. R. 85, and *Share v. Porter*, 3 T. R. 13.

³ *Cattley v. Arnold*, 1 John. & H. 651, 657; *Bartlett v. Baker*, 34 L. J. Ex. 11; *Tomkins v. Lawrance*, 8 Car. & P. 729, 731.

⁴ *Birch v. Wright*, 1 T. R. 380.

A tenancy from year to year is not to be considered as a continuous tenancy, but as commencing every year. *Tomkins v. Lawrance*, 8 Car. & P. 729; *Gandy v. Jubber*, 5 B. & S. 78, 33 L. J. Q. B. 151, 10 Jur. (N. S.) 652, 9 L. T. 800, 12 W. R. 526.

death in the third year, distrain for the unpaid rent of the second year on the theory that when a tenant from year to years holds over, his holding over must be regarded as an agreement which is a part of the original contract and in execution of it, and that the third year was not in the nature of a separate term of one year but that it was merely an offshoot and incident of the first year.⁵

§ 92. **The use of express language in creating a tenancy from year to year.** In England by many of the earlier common law

⁵ *Legg v. Strudwick*, 2 Salk. 414. "Leases from year to year appear at first view to give several distinct estates. In truth, they give only one time of continuance. That time, however, may be confined to one year, or extended to several years, according to circumstances attending the tenancy in its progress. In the first place, the lease is for one year certain, and after the commencement of every year, or perhaps after the expiration of the period in which a notice determining the tenancy may be given, it is a lease for the second year; and in consequence of the original agreement of the parties every year of the tenancy constitutes a part of the lease, and eventually becomes a parcel of the term, so that a lease which is in the first instance but for one year certain, may, in the event of a term, be one hundred years or more. Under this species of tenancy the law considers the lease with a view to the time which has elapsed, as arising from an estate for all that time, including the current year. For, as all the time for which the land may be held under a running lease is originally given, and in effect passes, by the same instrument or contract, the whole time is consolidated, and every year as it commences forms

a part of the time." *Preston on Estates*, p. 76. The importance of the principles just enumerated lies in the somewhat technical character of the laws of common-law pleading in their relation to framing a declaration in an action on the covenant for rent. In *Cattley v. Arnold*, 1 Johns. & H. 651, 28 L. J. Ch. 352, 5 Jur. (N. S.) 361, 7 W. R. 245. Vice Chancellor Wood says: "In the case of *Oxley v. James*, 13 Mee. & W. 209, 214, I find some observations of Lord Wensleydale, which, while they state the reasons for the decision of the court both in that case and in a previous case of *Pike v. Eyre*, 9 B. & Cr. 909, appear to me correctly to express the result of the authorities as to the nature of this tenancy. '*Legg v. Strudwick*,' he says, 'and *Bacon's Abridgment, Leases, L. 3*,' show what is the nature of an estate from year to year; namely, a lease for a year certain, *with a growing interest during every year thereafter, springing out of the original contract and parcel of it*. A demise, therefore, by such a person for a term of years is no assignment; he never means to part with the whole benefit of that interest. It is a term for so many years, subject to determination by the cessation of the original interest.'"

authorities it was at one time held that a lease, whether it were oral or in writing being couched in express language "from year to year so long as the parties were pleased to continue," was at least a lease for two years certain and that for that reason the lease was not terminable by a notice to quit served during the first year.⁶ But the more recent rule is that an express agreement whether in writing or by parol creating a lease by which one becomes a lessee "from year to year" at a certain definite and fixed annual rent, constitutes an express lease from year to year which is determinable by either party to it at the end of the first year, to the same extent that it is determinable at the end of any subsequent year, by the service of a proper and timely notice to quit.⁷ Hence it follows that where a tenancy from year to year has been by implication

⁶ *Agard v. King*, Cro. Eliz. 775; *Legg v. Strudwick*, 2 Salk. 414; *Doe d. Chadburn v. Green*, 9 A. & E. 658, 8 L. J. Q. B. 100, 1 P. & D. 454; *Birch v. Wright*, 1 T. R. 380; *Monck v. Geekie*, 5 Q. B. 841; *Hall v. Myers*, 43 Md. 581; *Hanchett v. Whitney*, 1 Vt. 315.

⁷ *Wood v. Beard*, 46 L. J. Q. B. 100, 2 Ex. D. 30, 35 L. T. 866; *Clarke v. Smarridge*, 7 Q. B. 957, 14 L. J. Q. B. 327, 9 Jur. 721. In which case Lord Denman said: "Now a tenancy from year to year lasts fully as long as both parties please; and that is, it is determinable by either party at the end of any year, by giving notice to quit one-half a year before the end of the year. There is no reason why it should not be so determined at the end of the first year as well as at the end of any subsequent year, unless the parties have by express contract precluded such determination. In the cases of *Agard v. King*, Cro. Eliz. 775; *Denn. dem. Jacklin v. Cartright*, 4 East, 29; *Bellases v. Burbrick*, 1 Salk. 209; *Legg v. Strudwick*, 2 Salk. 414; *Birch v. Wright*, 1 T. R. 378, 380;

Doe dem. Chadburn v. Greene, 9 A. & E. 658, such express contract appears either by the proceedings or by the evidence. In this case there is no such express contract but the tenancy for two years at least is supposed to be implied by necessity of law." The court, however, held that no such necessity existed. "If A. demise lands to B. for a year, and so from year to year, this is not a lease for two years, and afterwards at will; but it is a lease for every particular year, and, after the year is begun, the defendant cannot terminate the lease until the year is ended." *Stomfil v. Hicks*, 2 Salk. 413, Ld. Ray. 680. A lease at an annual rent, "for the term of one year and an indefinite period thereafter," where the tenant enters and occupies for several years, is a lease from year to year, and on the tenant's death passes to his personal representatives, who in their representative capacity are liable for the rent so long as they occupy. *Pugsley v. Aikin*, 11 N. Y. 494, reversing 14 Barb. (N. Y.) 114.

created by a tenant for a term of years holding over and paying rent after the expiration of his term the landlord may terminate the tenancy from year to year by a notice to go into effect at the end of the first year.⁸ A lease from year to year may be created by an indefinite hiring with a power in the tenant to leave at the end of any year. The renting of premises for an indefinite period and their occupation by a tenant for one year constitutes a tenancy from year to year.⁹ A lease of land for one year, with a privilege of continuing the same from year to year so long as both parties agree, creates a tenancy from year to year.¹⁰ A lease for one year with the privilege of three years from a certain day, confers on the tenant the right to remain from year to year not exceeding three years, and he may quit at the expiration of any year of the three. In a lease for one year from a certain day the landlord's right to re-enter does not begin until the first moment of the corresponding day on the following year.¹¹ A lease for "one year, and so on from year to year." is a lease for one year absolutely, and if the tenant continues for a second year without the dissent of the landlord, it is then a lease for another year, and so on for each succeeding year.¹² A lease from the first day of a certain month "until such time as the tenancy shall be terminated as hereinafter provided" at a yearly rent with a provision "that it shall be lawful for either party to determine the tenancy herein created by giving to the other three calendar months notice of his intention in writing is a yearly tenancy determinable by three months notice to expire at the end of any year of the tenancy and not an indefinite tenancy determinable by three months notice."¹³

§ 93. The character of the cultivation of the land as determining the period of the tenancy. The principle, that he who sows shall reap, founded as it is upon the broad basis of equitable and fair dealing between man and man and upon the well-recognized rule that the acceptance, possession and enjoy-

⁸ *Clark v. Smarridge*, 7 Q. B. 957, 14 L. J. Q. B. 327, 9 Jur. 721.

⁹ *Reg. v. St. Giles*, 4 B. & S. 509, 33 L. J. M. C. 3, 10 Jur. (N. S.) 205, 9 L. T. 411, 12 W. R. 125.

¹⁰ *Hatfield v. Lawton*, 108 App. Div. 113, 95 N. Y. Supp. 451.

¹¹ *Duffy v. Ogden*, 64 Pa. St. 240, 27 L. I. 77, 2 Leg. Gaz. 73.

¹² *Lesley v. Randolph*, 4 Rawle (Pa.) 123.

¹³ *Lewis v. Baker*, 75 Law J. K. E. 848; (1906) 2 K. B. 599, 95 L. T. 10, 22 L. T. 680.

ment of the benefits and privileges of the contractual relations by implication creates and imposes corresponding and reciprocal obligations was the moving cause that in very early times modified estates at will and changed them into tenancies from year to year. The bulk of land held in tenure was then agricultural and the necessity was very apparent and indeed urgent that some protection should be thrown around tenants to protect them from losing, by a sudden and arbitrary termination of their tenancy at will, the advantages and beneficial results of their labors in husbandry. The possession and enjoyment of the products of the tilled land was the consideration which moved and impelled the tenant cultivator to agree to pay and to pay the rent. And as the crops were usually yearly the tenancy was also yearly. So, on the same principle where land is hired at a yearly rental for use as a nursery for fruit trees which do not yield their produce annually but only after the trees have reached maturity and after several years of growth the lease will be regarded by the law as a lease from year to year so long as is necessary for the purpose of the tenancy.¹⁴ In certain peculiar circumstances where a crop, after being planted, requires two years to reach the condition in which it is ready for reaping a general hiring, no term being specified, might, it seems, be regarded by the common law as a tenancy from two years to two years, which cannot be terminated by a notice to quit at the end of the second or third year. Crops of madder and liquorice would very likely come under the rule. We are, however, without direct judicial authority on this question and at the most have merely the suggestions or opinions of text book writers to guide us.¹⁵

¹⁴ King v. Willcomb, 7 Barb. (N. Y.) 263; Miller v. Baker, 1 Met. (Mass.) 27.

¹⁵ See Adams on Ejectment, 138. "If the parties have omitted to express the duration of the term, the lease will nevertheless be valid. If it is a demise of an inheritance of which the fruits are gathered every year, such as a meadow, vineyard, etc., the lease is deemed to have been made for a year.

When it is a lease of an inheritance, the fruits of which are gathered at intervals of several years, the lease is deemed to continue for all the time that is requisite to enable the tenant to gather in the fruits. In a case where a person had leased land, no term being mentioned, for the purpose of brick-making, agreeing to pay the lessor so much per one thousand bricks upon the quantity made,

§ 94. The payment of a yearly rent as creating a tenancy from year to year. While it may safely be said that a mere general letting and occupation of real property, nothing having been expressly agreed upon by the parties thereto as to the duration or termination of the occupancy, constitutes ordinarily only a tenancy at will, the circumstance in connection with such a lease that the rent is payable annually, or not being thus payable is calculated and fixed at so much per year, though payable at shorter intervals is often, though not always, a controlling fact in converting what would otherwise be a tenancy at will into a tenancy from year to year.¹⁶ So, also, it has been held that though when the tenant goes into the occupation of the premises under an agreement for a lease but pays no rent he is merely a tenant at will, yet, as soon as he begins to pay rent by the year for his occupation under the agreement for a lease

the court, in holding that the lessee was merely a tenant from year to year, relied upon the facts that no premium for the lease was paid to the lessor by the lessee, that there was no power of distress, and no right of re-entry in the lessor and no obligation on the part of the lessee to work out the brick earth. Consequently the lessee unless the tenancy was by the year might hold the land for ever which evidently was not the intention of the lessor. In *re Stroud*, 8 C. B. 502, 530, 19 L. J. C. P. 117.

¹⁶ *Bishop v. Howard*, 2 B. & C. 100, 3 Dowl. & L. 293; *Richardson v. Langridge*, 4 Taunt. 128, 131; *Cattley v. Arnold*, 1 John. & H. 651. See, also, *Braithwayte v. Hitchcock*, 10 Mee. & Wel. 497; *Doe d. Lord v. Crago*, 6 Com. Bench, 96, 98; *Cox v. Bent*, 5 Bing. 185, 2 M. & P. 281; *Doe d. Pennington v. Tanriere*, 12 Q. B. 998, 18 L. J. Q. B. 49, 13 Jur. 119; *Dumn v. Rothermel*, 112 Pa. St. 272; *McDowell v. Simpson*, 3 Watts (Pa.)

135; *Hellams v. Patton*, 44 S. C. 454; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567; *Barlow v. Wainwright*, 22 Vt. 88; *Silby v. Allen*, 43 Vt. 172; *Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501, 34 N. W. Rep. 514; 4 Kent's Com. 111 *et seq.* Thus an oral lease for the term of one year at the rate of \$10 per month, which rent is to be increased to \$11 for another and succeeding year, does not create a monthly tenancy but a hiring by the year, the rent though being payable by the month. *Schneider v. Lord*, 62 Mich. 141, 28 N. W. Rep. 773. "It is clear that upon proof of the payment of rent in respect of the occupation of premises ordinarily let from year to year, the law will imply that the party making such payments holds under a tenancy from year to year." *Doe d. Lord v. Crago*, 6 Com. Bench, 90, 98. A lease from a certain date "at a yearly rent" creates a tenancy from year to year. *Florence v. Robinson*, 24 L. T. 705.

he becomes a tenant from year to year.¹⁷ Though if the payment of a yearly rent be unexplained a tenancy from year to year is presumed, this presumption is purely one of fact and it may be rebutted by evidence to the contrary.¹⁸ The receipt of rent may be explained so as to rebut the implication of a yearly tenancy arising out of the payment of rent by the year.¹⁹ Hence, from this it follows that whether a tenancy is from year to year, is a question of fact on all the evidence.²⁰ A tenancy from year to year may be inferred from periodical yearly payments only where it is impossible to account for such payments except upon the hypothesis that the payments were for rent. It may always be shown that the payments were for another purpose. Thus, it may be shown that a building contract and not a lease existed between a landowner and an occupant of land, and that the payments made to the owner were made on such a contract for the privilege of erecting buildings of which the payee was to have a lease in the future.²¹ So, too, the landlord may show that the yearly payment of rent was received by him under some mistake of fact, or under a misapprehension or in ignorance of certain circumstances where it is apparent that, if he had full knowledge of such circumstances, he would not have received the payments. Thus, where a landlord had continued to receive rent from a tenant after the termination of a lease for lives because the death of the lessees had been concealed from him, it was held that no tenancy from year to year

¹⁷ *Chapman v. Towner*, 6 Mee. & Wel. 100, 103; *Braithwaite v. Hitchcock*, 10 Mee. & Wel. 497; *Cox v. Bent*, 5 Bing. 185. See, also, *Hull v. Wood*, 14 M. & W. 682; *Mann v. Lovejoy*, R. & M. 355; *Saunders v. Musgrave*, 6 B. & C. 524.

¹⁸ *Rogers v. Pitcher*, 1 Marsh. 541, 1 Taunt. 202; *Williams v. Bartholomew*, 1 Bos. & Pul. 326.

¹⁹ *Doe d. Lord v. Crago*, 6 Com. Bench, 90, 17 L. J. C. P. 263, 12 Jur. 705; *Hurley v. Hanrahan*, 15 W. R. 990.

²⁰ "If there were a general letting at a yearly rent, though payable half yearly or quarterly, and

though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that one shall let, and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from making such an agreement." By Lord Mansfield in *Richardson v. Langridge*, 4 Taunt. 128, 130.

²¹ *Camden v. Batterbury*, 5 C. B. (N. S.) 808, 817, 28 L. J. C. P. 187, 5 Jur. (N. S.) 627, affirmed 7 C. B. (N. S.) 864, 28 L. J. C. P. 335, 5 Jur. (N. S.) 1405, 7 W. R. 616.

existed and as soon as he discovered this fact, which had been concealed from him, he might eject the occupier without previous notice to quit.²² An actual payment of rent by the year is not always necessary. An admission by a person who has entered on premises under an executory contract to make a lease that he owes the owner a half year's rent, in response to a bill rendered him for a half year's rent by the landlord, creates a tenancy from year to year though no rent is actually paid.²³ For an admission by a tenant that rent is payable by the year is usually sufficient. An agreement for a lease to be executed in the future for the term of twenty-one years, with a further agreement that the tenant shall go into possession at once, and that, until such lease should be executed, a yearly rent should be payable and recoverable by distress or otherwise in like manner as if such lease should have been executed, creates a tenancy from year to year, before any rent is paid.²⁴ But an agreement to pay rent by the year, though usually it creates a tenancy from year to year, does not control an express tenancy for a shorter period. A letter written by the lessee in which he states that he will agree to occupy the premises for three months if furnished, or will take them "at the rate of a specified sum per year" if unfurnished, does not, by the words "at the rate of so much per year," create a tenancy for a year.²⁵

²² Doe d. Lord v. Crago, 6 Com. Bench, 90.

²³ Cox v. Bent, 2 M. & P. 281, 5 Bing. 185, 7 L. J. (N. S.) C. P. 68, 30 R. R. 566.

²⁴ Doe d. Bailey v. Foster, 3 C. B. 215, 15 L. J. C. P. 263.

²⁵ Atherstone v. Bostock, 2 Man. & G. 511, 10 L. J. C. P. 113. "Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding; for in Richardson v. Longridge, 4 Taunt. 128, a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be a tenant at will

only. In the present case, there was distinct proof of the payment of rent for two quarters of a year. There is the additional fact of an occupation for more than a year; but in the case of Cox v. Bent, 5 Bing. 185, 2 M. & P. 281, where a party under an agreement for a lease had occupied for more than a year, the court held that a tenancy from year to year existed, not on the ground of the occupation, but because the party had during that occupation paid a half year's rent." By Parke, B., in Braythwaite v. Hitchcock, 10 M. & W. 494, 12 L. J. Ex. 38, 6 Jur. 976.

§ 95. The effect of the death of either party to a tenancy from year to year. It is well settled that a tenancy from year to year is not terminated by the death of either the landlord or the tenant during the current year. On the death of the landlord, in case of a tenancy from year to year, the unexpired term passes to his administrator or executor as a part of the landlord's personal estate and is assets in the hands of the representative for the payment of debts and legacies or for distribution among the next of kin to the same extent as other personal property is.²⁶ So, also, on the death of the tenant of an estate from year to year the estate still continues and the personal representative may enter and he becomes responsible as such and not personally for the rent to the extent that he has assets of the tenant. And the fact that on the death of the tenant his widow enters and pays rent to the landlord does not terminate the tenancy from year to year.²⁷ The estate of the deceased tenant for years is responsible for rent which has accrued and if the executor enters for that which will accrue. The tenancy from year to year survives the lessor and vests in his heirs. An exception to this general rule occurs where the interest of the landlord of an estate from year to year itself terminates on his death as where the landlord has only a life estate or interest in the land with the fee in another. Under such circumstances the tenant from year to year of one who himself is only a life tenant becomes a tenant at sufferance on the death of his landlord, unless, as sometimes happens, the life tenant had a power to lease, which he has exercised, to bind the estate of the remainderman or reversioner. If this be not the case, the latter may, without notice or demand of possession, eject the tenant from year to year of the life tenant on the death of the latter.²⁸ If the remainderman is of age at the death of the life tenant, his action in receiving rent from the tenant from year to year and in continuing him in the possession may, after the life tenancy has terminated, by constituting a new tenancy from year to year as between him and the tenant holding over, prevent the remainderman from ejecting the tenant from year to year

²⁶ Doe d. Hull v. Wood, 14 M. & W. 682. See Robie v. Muth, 21 Me. 114.

²⁷ Hull v. Wood, 14 M. & W. 682.

²⁸ Thomas v. Roberts, 16 M. & W. 780.

without giving him notice to quit.²⁹ Such an estoppel by receiving rent is not created by a tenant from year to year holding over where the remainderman is an infant, because the executors of the life tenant accept rent from the tenant from year to year.³⁰ The action of the executors who represent the deceased life tenant does not bind the infant remainderman and would not bind a remainderman though he were an adult. The delay of the personal representative of the tenant for years in enforcing his right to possession as against a person who remains in possession on the death of a tenant for years does not prejudice the rights of the representative. He has a right to have a period of consideration in order that he may ascertain whether it is or is not advantageous to the estate that he should take possession and the fact that during this period the widow of the deceased tenant from year to year remains in possession and pays rent to the landlord does not prevent the personal representative from ousting her.³¹ In the absence of a specific statutory requirement to the contrary, after the death of either the landlord or tenant of a tenancy from year to year the personal representative of the deceased may give or receive a notice to quit where the tenancy itself has survived.³² So, also, a tenancy from year to year is never terminated by the insanity of either the landlord or the tenant. If during any year the lessor becomes insane and is judicially pronounced incompetent to manage his affairs, the committee appointed becomes the lessor of the term and the tenant must deal with him as his landlord. The same would be true in a case where the tenant became incompetent.³³

§ 96. The rule as to repairs by a tenant from year to year. A tenant from year to year is bound only to make such repairs

²⁹ *Roe d. Jordan v. Ward*, 1 H. Black. 96.

³⁰ *Thomas v. Roberts*, 16 M. & W. 780.

³¹ *Doe d. Hull v. Wood*, 14 Mee. & Wel. 682.

³² A lease to A. B., his executors, etc., from year to year for so long time as it shall please the lessor and A. B. his executors, etc., does not expire on the death of A. B., but vests in his executors.

It is more than a mere lease from year to year for if it had been such, says Lord Mansfield in this case, it would have expired without notice at the end of the year after the death of A. B. The term, however, continues after the death of A. B. until it is terminated by his executor. *Mackay v. Mackreth*, 4 Doug. 213, 219.

³³ *McFall v. McFall*, 35 S. C. 539, 14 S. E. Rep. 985.

as will keep the house in a tenantable position. He is not responsible for ordinary wear and tear, nor for permissive waste.³⁴ He is not liable to make substantial and lasting repairs.³⁵ And is only bound to keep the house which he occupies in such a condition that it may be habitable.³⁶ If, however, the occupant is tenant from year to year under a void lease, which contains the usual covenants by the tenant to repair, he will be bound by such covenants and will be compelled to make the repairs which are called for by them.³⁷ Thus where a lease was made by a corporation for the term of three years and the tenant agreed to put, maintain and deliver the premises in tenantable repair and he entered thereon, he was held to be a tenant from year to year as the lease was void because the seal of the corporation was not on it, and the tenant was liable to keep in repair according to its terms though he was a tenant from year to year.³⁸ On the other hand the landlord of a tenant from year to year is not bound to make substantial repairs of the premises in the absence of an express agreement on his part.³⁹

³⁴ *Torriono v. Young*, 6 Car. & P. 8, 12. See *Martin v. Gilham*, 2 N. & P. 568, 7 A. & E. 540, 7 L. J. Q. B. 11.

³⁵ *Ferguson v. ———*, 2 Esp. 590, 5 R. R. 757; *Horsefall v. Mather*, Holt, N. P. 7, 17 R. R. 589; *Leach v. Thomas*, 7 Car. & P. 328.

³⁶ *Auworth v. Johnson*, 5 Car. & P. 239.

³⁷ *Beale v. Sanders*, 3 Bing. (N. C.) 850, 5 Scott. 58, 3 Hodges, 147, 6 L. J. C. P. 283, 1 Jur. 1083.

³⁸ *Ecclesiastical Comm'rs v. Mer-rall*, 38 L. J. Ex. 93, 1 L. R. 4 Ex. 162, 20 L. T. 573, 17 W. R. 676.

³⁹ *Gott v. Gandy*, 2 El. & Bl. 845, 2 C. L. R. 392, 23 L. J. Q. B. 1, 18 Jur. 310, 2 W. R. 38. A covenant to build or to do such substantial repairs as are not usually done by a tenant from year to year will not usually be implied in the case of a tenancy from year to year. Such covenants will not be imposed even though the agreement

for a lease stipulates for such covenants or stipulates for the insertion of the usual covenants. *Bowes v. Croll*, 6 E. & B. 264. But where a tenancy is created by an entry of a tenant under a void agreement to make a lease by the terms of which the tenant was to keep the premises in good and tenantable repair the covenant to repair will be implied and will bind the tenant from year to year. Thus where a tenant went into possession under an agreement by which he was to have a lease for three years and a quarter, he to keep the premises in tenantable repair during the said term, and the agreement was void for the reason that it was neither stamped as a lease nor signed by the parties, it was held that the tenant was bound to repair during his occupancy, though the agreement was void under the statute of frauds. In this case (*Richardson v. Gif-*

§ 97. A tenancy from year to year created by tenant holding over. Where the tenant holds over after the expiration of the lease, and the lessor receives rent accruing subsequently to the expiration of the term, or does any act from which it may be inferred that he intends to recognize him still as a tenant, he becomes thereby by implication a tenant from year to year upon all the terms of the original lease.⁴⁰ And the same rule is true

ford, 1 Ad. & El. 52) the court by Parke, J., said: "He did not legally agree for the term of three years, but, in point of law, he was tenant at will for the first year, subject to the terms of the agreement on his own part, and afterwards tenant from year to year subject still to the same agreement, which bound him to keep the premises in good repair as long as he should occupy." And, hence, generally, when a tenant goes into possession under an agreement for a lease, or under a void lease, he will, after payment of rent under it, be treated as subject to the terms and conditions of the agreement or lease so far as the same are applicable to a tenancy from year to year but no further. If any of the conditions are inconsistent with such a tenancy from year to year they will be rejected.

⁴⁰ Belding v. Texas Produce Co., 61 Ark. 377, 33 S. W. Rep. 421; Parker v. Hollis, 50 Ala. 411; Stoppelkamp v. Mangeot, 42 Cal. 316; Bacon v. Brown, 9 Conn. 334; Robertson v. Simons, 109 Ga. 360, 362, 34 S. E. Rep. 604; Crutchfield v. Remaley, 21 Neb. 178, 31 N. W. Rep. 687; Tanton v. Van Alstine, 24 Ill. App. 405; Quinlan v. Bonte, 25 Ill. App. 240; Board of Directors v. Chicago Veneer Co., 94 Ill. App. 492; Belding v. Texas Produce Co., 61 Ark. 377, 33 S. W.

Rep. 421; Goldsborough v. Gable, 140 Ill. 269, 29 N. E. Rep. 722, 15 L. R. A. 294; Kleespies v. McKenzie, 12 Ind. App. 404, 40 N. E. Rep. 648; Wheat v. Brown, 3 Kan. App. 431, 43 Pac. Rep. 807; Moshier v. Reding, 12 Me. 478; Wiggins v. Ferry Co., 82 Ill. 230; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151, 165; Clapp v. Paine, 18 Me. 264; Alleman v. Vink, 28 Ind. App. 142, 62 N. E. Rep. 461; Theiband v. Bank, 42 Ind. 312; Hall v. Myers, 43 Md. 416; Gardner v. Commissioners, 21 Minn. 33; Hunter v. Frost, 47 Minn. 1, 49 N. W. Rep. 327; Smith v. Bell, 44 Minn. 524, 47 N. W. Rep. 263; Usher v. Moss, 50 Miss. 208; Finney v. St. Louis, 39 Mo. 177; Quinette v. Carpenter, 35 Mo. 502; Bilcher v. Parker, 40 Mo. 113; Delaney v. Flanagan, 41 Mo. App. 651; Yates v. Kinney, 19 Neb. 275; Ketcham v. Ochs, 77 N. Y. Supp. 1130, 70 N. Y. Supp. 268, 34 Misc. Rep. 470; Ridgeway v. Hannum, 129 Ind. App. 124, 64 N. E. Rep. 44; Bradley v. Covell, 4 Cow. (N. Y.) 349; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. Rep. 94, 45 N. Y. St. Rep. 243, affg. 14 N. Y. Supp. 951; Commissioners v. Clark, 133 N. Y. 251; Clark v. Howland, 85 N. Y. 204; Jackson v. Salmon, 4 Wend. (N. Y.) 327; Moore v. Beasley, 3 Ohio, 294; Laguerenne v. Dougherty, 35 Pa. St. 45; Logan v. Herron, 8 S. & R. (Pa.) 459;

under a lease for two years.⁴¹ It is not material as influencing this construction whether the same rent is paid by the tenant holding over as was paid under the lease which had expired.⁴² or whether the tenant holding over has agreed to pay an increased rent during the period he continues to hold over.⁴³ In all these cases the payment of rent creates the tenancy from year to year. If the rent is paid by the year or so much per year the inference is almost irresistible that he had in mind a tenancy from year to year, but the fact that the rent is payable semi-annually has in one case at least been held insufficient to rebut the presumption.⁴⁴ This rule applies to municipal and other corporations as well as to individuals, so that a corporation holding over after the expiration of its lease with the assent of the lessor becomes a tenant from year to year.⁴⁵ There is a presumption of law that a tenant holding over with the assent of the lessor becomes a tenant from year to year, and such

Hemphill v. Flynn, 2 Pa. St. 144; Phillips v. Monges, 4 Whart. (Pa.) 229; Simmons v. Jarman, 122 N. C. 195, 29 S. E. Rep. 332; Gladwell v. Holcomb, 60 Ohio St. 427, 433, 54 N. E. Rep. 473; Railroad Co. v. West, 57 Ohio St. 161; Amsden v. Atwood, 35 Atl. Rep. 311, 67 Vt. 289, 31 Atl. Rep. 448; Noel v. McCrary, 7 Coldw. (Tenn.) 623; Emerick v. Tanner, 9 Gratt. (Va.) 220, 58 Am. Dec. 217; Allen v. Bartlett, 20 W. Va. 46; Arbenz v. Exley, 52 W. Va. 476, 44 S. E. Rep. 149; King v. Wilson, 98 Va. 259, 35 S. E. Rep. 727; Baltimore Dental Ass'n v. Fuller, 101 Va. 627, 44 S. E. Rep. 771; Brown v. Kayser, 60 Wis. 1; Bishop v. Howard, 3 D. & R. 293, 2 B. & C. 100, 1 L. J. (O. S.) K. B. 243, 26 R. R. 291; Kelly v. Patterson, 43 L. J. C. P. 320, L. R. 9 C. B. 680, 30 L. T. 842; Cornish v. Stubbs, 39 L. J. C. P. 202, L. R. 5 C. P. 334, 22 L. T. 21, 18 W. R. 547; Doe d. Clarke v. Smarridge, 7 Q. B. 957, 14 L. J. Q. B. 327, 9 Jur. 781; Doe d. Hol-

lingsworth v. Stennet, 2 Esp. 717; Doe d. Rogers v. Pullen, 3 Scott, 271, 279, 2 Bing. (N. C.) 749, 2 Hodges, 39, 5 L. J. C. P. 229; Digby v. Atkinson, 4 Camp. 275, 278; Finch v. Miller, 5 Com. Bench, 428; Pierce v. Shaw, 2 M. & R. 418; Bridges v. Potts, 17 Com. Bench (N. S.), 314, 335; Dougal v. McCarthy, 4 Reports, 402; (1893) 1 Q. B. 736.

⁴¹ Belding v. Texas Produce Co., 61 Ark. 377, 33 S. W. Rep. 421.

⁴² Wheat v. Brown, 3 Kan. App. 431, 43 Pac. Rep. 807.

⁴³ Zippar v. Reppy, 15 Colo. 260, 25 Pac. Rep. 164, citing Digby v. Atkinson, 4 Camp. 275, in which Lord Ellenborough says: "The mere advance of the rent, in my opinion, makes no difference."

⁴⁴ Adams v. Cohoes, 127 N. Y. 175, 28 N. E. Rep. 25, affg. 53 Hun, 260, 6 N. Y. Supp. 617, 25 N. Y. St. Rep. 523.

⁴⁵ Artt v. New York, 28 N. Y. Super. Ct. (5 Rob.) 248.⁴

presumption may be rebutted by proof that the holding was in some other character or for some other purpose.⁴⁶

§ 98. **Rebutting the presumption which arises on a tenant holding over.** The presumption that a tenant holding over and paying rent after the expiration of his term, is a tenant from year to year is as a general rule regarded as only a presumption of fact and continues only until the contrary is shown.⁴⁷ It may be shown by a landlord who denies that a tenancy from year to year has been created by his receipt of rent from a tenant holding over, that the landlord accepted or received the rent from the tenant under some mistake, misunderstanding or misapprehension of fact or in ignorance of a material fact which if it had been known to him at the time he received or accepted the rent would have caused him to decline to receive it.⁴⁸ The receipt of rent by the year creates a tenancy from year to year solely because the law presumes that such was the intention of the parties. It is presumed that they thereby contracted for a yearly lease and as an intention is always an essential element of a contract if there is no intention there is

⁴⁶ *Williamson v. Paxton*, 18 Gratt. (Va.) 475. The silence of the landlord where a tenant for a year holds over may and in fact in most cases as has been set forth in the text create a tenancy for another year and so on from year to year. But this rule does not apply to the case of a tenant whose term is for a very short period only, less than year holding over with the acquiescence of the landlord and upon the tenant promising to pay rent at the same rate as under the lease which has expired. *Montgomery v. Willis*, 45 Neb. 434, 63 N. W. Rep. 794. A tenancy from year to year, beginning on the first day of November, is created, where by an oral lease of premises situated in New York city it is in express terms agreed that the hiring shall be for one year from the first day of November, and the ten-

ant remains in possession for a number of years without any further agreement between the parties. 3 Rev. St. N. Y. (7th ed.) p. 2200, § 1, does not apply to such a case. *Laimbeer v. Tailer*, 125 N. Y. 725, 26 N. E. Rep. 756, affg. 4 N. Y. Supp. 588, 21 St. Rep. 380.

⁴⁷ *Secar v. Pestana*, 37 Ill. 525; *Dubuque v. Miller*, 11 Iowa, 583; *Brewer v. Knapp*, 1 Pick (Mass.) 332; *Quinnette v. Carpenter*, 35 Mo. 502; *Grant v. White*, 42 Mo. 285; *Darrill v. Stevens*, 4 McCord (S. C.) 39; *Moore v. Beasley*, 3 Ohio, 294; *Sheldon v. Davey*, 42 Vt. 637; *Stedman v. Gassett*, 18 Vt. 346; *Williams v. Paxton*, 18 Gratt. (Va.) 475; *Mayor of Thetford v. Tyler*, 8 Q. B. 95.

⁴⁸ *Doe d. Lord v. Crago*, 6 Com. Bench, 90, 98; *Oakley v. Monck*, 3 H. & C. 706.

no lease. The parties are permitted to show what was the true intention by any relevant evidence and the true intention when proved may overcome the implied intention.⁴⁹ The right of the landlord to rebut the presumption as against the tenant necessarily confers upon the tenant the reciprocal right to rebut the presumption of a tenancy from year to year as against the landlord seeking to recover rent from him upon the assumption that he is a tenant from year to year. If on the termination of a lease for a definite period the landlord expresses no intention of leasing the premises to the tenant for a new definite period but simply permits him to remain in possession and to pay rent as before, he is a tenant from year to year. If, however, at or before the expiration of the lease the landlord informs the tenant that he will not be allowed to occupy the premises after the expiration of the term except as tenant from month to month, no implied tenancy from year to year will arise, for an implied tenancy arises only from the presumed intention of the parties where they are silent and where they permit the facts and circumstances of the case to speak for them and where the landlord expressly states his intention and the tenant is silent, the tenant will be presumed to have assented to the proposition.⁵⁰

§ 99. The modification of the terms of the original lease as against a tenant holding over. The presumption that the tenancy from year to year which arises from a tenant holding over

⁴⁹ "When a tenant, whose term has expired by efflux of time, instead of quitting the premises as he ought to do, remains in possession, holding over as it is called, he is a wrong-doer and may be treated as such by the owner, his landlord. By the consent of his landlord, his tenancy may be continued, and if such continuance by consent be without any fixed limit, he becomes a tenant from year to year, as it is called. This consent may be either express or implied; actual or constructive by words or by some act recognizing or treating him as a tenant. But without a new contract, or some act on

the part of the landlord from which a renewal of the contract may be implied, the person in possession continues a wrong-doer, is liable to be treated as such and must attribute to his original wrong and subsequent folly, any inconveniences which may ensue. The mere unbroken silence and inaction of the owner will not improve or enlarge the character of the tenant's possession." By the court, Ewing, C. J., in *Den ex dem. Decker v. Adams*, 12 N. J. Law, 99, on page 100.

⁵⁰ *Shipman v. Mitchell*, 64 Tex. 174.

is on the same terms as to rent, etc., as was the original lease, may be overcome by clear proof that the parties to the original lease on or before its expiration agreed that the rent should be modified on the holding over. The presumption that a tenant holding over with the consent of the landlord is a tenant at will, or from year to year, as the case may be, upon the same terms so far as the amount of rent is concerned as he had under the original lease is conclusively rebutted if it is shown that a new agreement was made to pay an advanced rental during the holding over. And if either after or prior to the termination of the lease the landlord informs the tenant that in case he holds over after the expiration of an existing term a greater rent will be expected from him than he has paid under the original lease, and the tenant holds over without saying anything in reply to the landlord's demand or notice for an advanced rent, his continuing in possession taken in connection with his silence will be regarded as an assent on his part to pay the advanced rental.⁵¹ Where a tenant holding under a lease in writing from year to year is told by his landlord during any one of the yearly periods that his rent will be greater on the ensuing year and he thereafter holds over, it will be conclusively presumed that he has agreed to pay an increased rental and the terms of his lease will be modified accordingly. He will thereafter be liable to pay the increased rent from year to year so long as he continues to hold unless the rental contract is again modified by a restoration of the rent to the original figure.⁵² So, if a tenant is told by his landlord before the expiration of his term that if he remains

⁵¹ *Hunt v. Bailey*, 39 Mo. 257. See, also, *Roberts v. Hayward*, 3 Car. & P. 432, in which the court by Best, C. J., said on page 433: "The tenancy under the agreement expired at midsummer, 1826. Immediately after that time, the plaintiff (the tenant) was a trespasser but the landlord was not obliged to treat him as such, but might make proposals to him to renew the relation of landlord and tenant between them. This he did and the plaintiff did not say 'I will go out directly.' His silence is

tantamount to saying 'I will continue in on the terms of your proposal.' I am of the opinion that under the circumstances the distress was regular. I think the landlord had the right to make any terms he pleased for the time subsequent to Lady's Day, 1827, and if the plaintiff would not accept them, to turn him out of possession."

⁵² *Moore v. Harter*, 67 Ohio St. 250, 65 N. E. Rep. 883; *Thompson v. Sanborn*, 52 Mich. 141.

thereafter he will have to pay an increased rent which is distinctly specified, the tenant becomes liable for the rent for another year at the increased rate though on the notice of the increase of the rent he has notified his landlord that he remains under protest and only until he can secure another place.⁵³ The tenant's conduct in continuing in possession after notice by the landlord is an acceptance of the landlord's proposition. An advance or a reduction of the rent made by agreement or by assent on the part of the tenant does not always conclusively rebut the presumption or implication that a tenant holding holds over under the terms of the former lease so far as such terms are applicable to the new holding. An agreement for an alteration of the rent on holding over, nothing else being said by either party, does not necessarily amount to a new demise which will render inadmissible the terms and the facts and circumstances of the original letting. Though the tenant holding over does not actually hold under the original lease which has expired, still, where the parties have made no new arrangements after the original lease has terminated except to alter the amount of rent which is to be paid, the law will imply that they had at all times the terms and provisions of the old lease in mind and that they made their new arrangement with reference to it. The landlord cannot sue a tenant holding over after the expiration of the original lease on any covenant of it, where any of the implied covenants are broken during the new holding, but he may sue him in assumpsit for rental and the former lease should be received in evidence to show the character of the covenant which it is claimed to have been implied.⁵⁴ The periods at which the rent is payable under the original lease, whether yearly, monthly or otherwise will determine when the rent shall be payable under the lease implied from the holding over.⁵⁵ And in conclusion it should be said that the presumption that a tenant who holds over is holding over upon the terms of the original lease is not rebutted by proof of a different intention on the part of the

⁵³ *Brinkley v. Wolcott*, 10 Heisk. (Tenn.) 22.

⁵⁴ *Digby v. Atkinson*, 4 Camp. 276, 278; *Monck v. Geekle*, 9 Ad. & El. 841.

⁵⁵ *Conway v. Starkweather*, 1 Den. (N. Y.) 113; *Dorrill v. Stevens*, 5 McCord (S. C.) 49.

tenant alone which is not communicated to or assented in by the landlord.⁵⁶

§ 100. **Holding over—Excused when caused by action of the Board of Health.** The power of Boards of Health conferred upon them by legislative enactment under the exercise of the police power to regulate the care and transportation of persons ill with infectious or contagious diseases is very broad and far reaching. In the state of New York and perhaps in most of the states of the Union which have adopted codes of sanitary rules and regulations, the isolation of such persons is strictly enjoined. It is provided that all communication with a house or family infected with any contagious, infectious or pestilential disease may be forbidden by a Board of Health, except by means of physicians, nurses or messengers, to carry the necessary advice, medicines or provisions to the afflicted. The Board of Health has jurisdiction to act summarily in determining whether a condition of affairs has arisen which will justify it in forbidding general access to or egress from the infected premises; its action, though open to judicial review in a direct proceeding to which the board is a party, cannot be questioned in a collateral proceeding. A landlord knows, or rather, in law, he will be presumed to know the law in this respect and the parties to a lease will be presumed to have contracted with reference to the existence of the law giving Boards of Health such discretionary powers, and they will be presumed to have had in view in contracting any contingency which would give occasion for the exercise of such powers. Hence a holding over which is involuntary for the reason that the tenant is prevented from removing by the orders and direction of the Board of Health will not be equivalent to a renewal of the lease by the tenant nor will the landlord be permitted to recover double rent under a statute providing for double rent in a case of a holding over by a tenant after he has given notice that he will quit.⁵⁷

⁵⁶ Chicago v. Peck, 196 Ill. 260, 63 N. E. Rep. 711, afg. 98 Ill. App. 434; Board of Directors of Chicago Theological Seminary v. Chicago Veneer Co., 94 Ill. App. 492; Clinton Wire Cloth Co. v. Gard-

ner, 99 Ill. 151, 165. See Hunt v. Bailey, 39 Mo. 257.

⁵⁷ Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. Rep. 94; Herter v. Mullen, 9 App. Div. 593, 41 N. Y. S. 708.

§ 101. **Statutory modification of the rule that a holding over creates a tenancy from year to year.** The common law rule that, where a tenant for years holds over, and continues to pay rent, a tenancy from year to year is established, is abrogated by statute in some states. Thus in Iowa, it is enacted by statute that any person in possession of land with the assent of the owner is presumed to be a tenant at will until the contrary is shown.⁵⁸ Where such statutes exist a mere tenancy at will is created by a tenant holding over in the absence of proof of a special contract to the contrary, though he may pay rent by the year. So, also, where a statute expressly provides that the time agreed on in a definite letting shall be the termination thereof for all purposes and the premises are leased in express terms for one year, a tenant who holds over after the expiration of the year becomes a tenant at sufferance only and not a tenant from year to year.⁵⁹

§ 102. **Tenancies from year to year created by leases void under the statute of frauds.** A tenancy from year to year may be created by a tenant going into possession of land and paying rent computed by the year under a parol lease for a term of years when the lease for years is void as such under the statute of frauds.⁶⁰ On the entry of the tenant into possession, the

⁵⁸ O'Brien v. Troxel, 76 Iowa, 760, 40 N. W. Rep. 704.

⁵⁹ Wood v. Page, 24 R. I. 594, 54 Atl. Rep. 372.

⁶⁰ Lockwood v. Lockwood, 22 Conn. 425; Strong v. Crosby, 21 Conn. 398; Stewart v. Apel, 5 Houst. (Del.) 189; Cady v. Quarterman, 12 Ga. 386; Western Union Tel. Co. v. Fair, 52 Ga. 18; Swan v. Clark, 80 Ind. 57; Nash v. Beckmen, 83 Ind. 536; Coan v. Mole, 39 Mich. 454; Huntington v. Parkhurst, 87 Mich. 38, 49 N. W. Rep. 597; Delaney v. Flanagan, 41 Mo. App. 651; Hosli v. Yokel, 58 Mo. App. 169; Ridgley v. Stillwell, 28 Mo. 40; Goodfellow v. Noble, 25 Mo. 60; Kerr v. Clark, 19 Mo. 132; Scudly v. Murray, 31 Mo. 420, 86 Am. Dec. 116; Drake

v. Newton, 23 N. J. Law, 111; Loughran v. Smith, 75 N. Y. 205; Craske v. Christian Union Pub. Co., 17 Hun (N. Y.), 319; Friedhoff v. Smith, 13 Neb. 5, 12 N. W. Rep. 820; Humphrey Hardware Co. v. Herrick, 5 Neb. (unof.) 524, 99 N. W. Rep. 233, 234; Schneider v. Lord, 62 Mich. 141, 28 N. W. Rep. 773; Schuyler v. Leggett, 2 Cow. (N. Y.) 660; Reeder v. Sayre, 70 N. Y. 180, 184; Condert v. Cohn, 118 N. Y. 309, 313, 23 N. E. Rep. 298, aff'g 43 Hun, 454, 6 N. Y. St. Rep. 733; Baltimore, etc., R. Co. v. West, 57 Ohio St. 161, 49 N. E. Rep. 344; Rosenblat v. Perkins, 18 Or. 156, 22 Pac. Rep. 598; Thurbur v. Dwyer, 10 R. I. 355, 357; Hellams v. Patton, 44 S. C. 454, 22 S. E. Rep. 608; Matthews v. Hipp,

parol lease, though it be invalid so far as the creation of a term in writing is concerned, creates a tenancy at will and is also recognized as indicating the intention of the parties as regards all other conditions and terms of the original letting. The amount of the rent fixed in the parol lease will be the rent which the tenant must pay, in the absence of an express agreement to the contrary, and generally all the covenants and conditions which are contained in the void oral lease except those which fix the term of the letting, will regulate the hiring from year to year.⁶¹ A person who had entered upon premises under a lease which is void under the statute of frauds is merely a tenant at will. His continuing in possession for over a year after the date of his entry and also his paying rent upon a yearly basis turns his holding into a tenancy from year to year.⁶² Generally the payment of the rent for one year at a yearly rate with a holding over by the tenant after the expiration of the first year will constitute the tenancy a tenancy from year to year.⁶³ Tenancies for other periods, as for example, by the

66 S. C. 162, 44 S. E. Rep. 577; Doe d. Rogers v. Pullen, 3 Scott, 271, 2 Bing. (N. C.) 749, 2 Hodges, 39, 5 L. J. C. P. 229; Dicke v. Harper, 6 Yerg. (Tenn.) 280; Berrey v. Lindley, 3 Man. & G. 496; Thunder v. Belcher, 3 East, 449; Clayton v. Blahey, 8 Term Rep. 3, 4 R. R. 575; Doe d. Rigge v. Bell, 5 Term Rep. 471, 2 R. R. 642.

⁶¹ Baylies v. Ingram, 84 A. D. 360, 82 N. Y. Supp. 891; Coudert v. Cohn, 118 N. Y. 309, 313, 23 N. E. Rep. 298, aff'g 43 Hun, 454, 6 N. Y. St. Rep. 733; Reeder v. Sayre, 70 N. Y. 180, 184; Richardson v. Gifford, 1 Ad. & El. 52; Doe v. Collings, 7 C. B. 939; Tress v. Savage, 4 El. & B. 36; Lee v. Smith, 9 Exch. 662; Martin v. Watts, 7 T. R. 83; Riggs v. Bell, 5 T. R. 471; Clayton v. Blakely, 8 T. R. 3; Pennington v. Tanriere, 12 Q. B. 998; Arden v. Sullivan, 14 Q. B. 832; Doe v. Amey, 12 Ad. & El. 476.

⁶² Mathews v. Hipp, 66 S. C. 162, 44 S. E. Rep. 577.

⁶³ "Though the agreement is void by the statute of frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, etc. So, where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now, in this case, it was agreed that the tenant should quit at Candlemas; and, though the agreement is void as to the number of years for which defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years he can only put an end to it at Candlemas." By Lord Kenyon in Doe d. Rigge v. Bell, 5 T. R. 471.

month, or by the quarter, may be created by an entry into possession under a lease which is invalid under the statute of frauds and a payment of rent with reference to a particular period short of a year. So, a tenancy from month to month is created by the acceptance of rent under a lease void under the statute of frauds, where the rent is payable monthly,⁶⁴ and the tenant goes into possession. For a reservation of rent in the void lease according to a particular period may convert a holding under the void lease into a monthly or yearly tenancy according to the circumstances. But it has been held that the rule that an annual reservation of rent is necessary to turn a lease for an uncertain term into a lease from year to year does not apply to a parol tenancy for years, void under the statute of frauds, where the rent has been paid in advance, and such tenancy becomes a tenancy from year to year, though no rent was reserved by the year.⁶⁵ So an oral agreement by which a tenant under a written lease for five years relets a portion of the premises to his landlord for the same term becomes, under the statute of frauds, a tenancy from year to year.^{65a} But a tenancy from year to year cannot be created by an occupancy for two years under a parol lease for five years, since such contract is void as one not to be performed in a year and the relation of landlord and tenant is not created at all.⁶⁶

§ 103. **Tenancies from year to year arising from defective and unexecuted leases.** Where a tenant enters and pays a yearly rent under a lease for a term of years which is void for any reason, he will be regarded as a tenant from year to year. Thus, for example, where a long absent owner of property returns and repudiates the lease made by a guardian of his heirs, on the supposition of his death,⁶⁷ or the mortgagee fails to join in a lease of the mortgaged premises,⁶⁸ or a lease for five years is executed by the tenant alone,⁹⁶ or a lease is imperfectly exe-

⁶⁴ *Utah Loan, etc., Co. v. Garbutt*, 6 Utah, 342, 23 Pac. Rep. 758, and see, also, *Donohue v. Chicago Bank Note Co.*, 37 Ill. App. 552.

⁶⁵ *Brant v. Vincent*, 100 Mich. 426, 59 N. W. Rep. 169.

^{65a} *Loundsberry v. Snyder*, 31 N. Y. 514.

⁶⁶ *Hughish v. Marvin*, 128 N. Y. 380.

⁶⁷ *Farley v. McKeegan*, 48 Neb. 237, 67 N. W. Rep. 161.

⁶⁸ *Hart v. Stockton*, 12 N. J. L. 322.

⁹⁶ *Loughran v. Smith*, 11 Hun (N. Y.) 311.

cuted so that it is void,⁷⁰ or is void because it is unacknowledged.⁷¹ A tenant who enters into possession of the premises and pays rent under an agreement for a lease, as he becomes a tenant from year to year, is thereafter bound by all the covenants mentioned in the agreement for a lease so far as those covenants are consistent with a lease from year to year.⁷²

§ 104. The necessary incidents of a tenancy from year to year. A tenant from year to year possesses a demisable interest in his term and may sublet for any period less than a year subject to all the limitations and restrictions which are applicable to his own lease, unless expressly forbidden by his lease. If he or his landlord shall elect to terminate the tenancy from year to year, all subleases are terminated thereby irrespective of the fact that otherwise the sublease would have held over after the termination of any year. The tenant from year to year may also mortgage his term.⁷³ He may also, unless expressly restrained by some agreement not to do so, assign the term which he has and his assignee takes the estate subject to all the restrictions and covenants which were attached to it in the hands of the original lessee. A tenant from year to year may unquestionably sublet a portion of his premises. But where he does this and then surrenders to his landlord the portion remaining in his own possession without either receiving a notice to quit or giving one to his sub-tenant, or surrendering the part occu-

⁷⁰ *Fougera v. Cohn*, 43 Hun (N. Y.) 454; *Carey v. Richards*, 2 Ohio Dec. 630.

⁷¹ *Thurber v. Dwyer*, 10 R. I. 355. The lessee is a tenant from year to year after he has entered and paid rent by the year. If he has not paid rent by the year he would be a tenant at will, and after the lease was pronounced void perhaps a tenant at sufferance. In *Kernochan v. Wilkins*, 3 App. Div. 596, 38 N. Y. Supp. 236, 78 N. Y. St. Rep. 853, the circumstances were as follows: Certain trustees deriving their powers to lease land from a will made a lease for the term of ten years. The written instrument of lease

was in its form a lease by them not as trustees but as individuals only. It was not signed by one of the trustees. The tenant, however, knew that they were trustees and knew what power they had to lease. He went into possession and occupied the demised premises for five years, paying rent by the year. The lease, of course, was void as a lease by the trustees, but it was held that though it was void as a lease for the full term, yet it created a valid lease from year to year.

⁷² *Doe d. Thompson v. Amey*, 4 P. & D. 177, 12 A. & E. 476.

⁷³ *Burrows v. Gradin*, 1 Dowl. & L. 213.

pied by his sub-tenant, the landlord cannot recover rent against the sub-lessee. There is no privity of contract between the original landlord and the sub-tenant; the former shall give notice to quit in his own name for as to the part sublet the original tenancy still exists⁷⁴ as between the primary landlord and his tenant and the latter continues to be liable for the rent until he serves a notice to quit or until the landlord accepts a surrender by the tenant.

§ 105. **Tenancies from month to month—How created.** A tenancy from month to month will generally arise where no definite term of letting is specified by the parties and the rent is payable monthly.⁷⁵ So a lease at will with the rent payable in monthly instalments becomes a tenancy from month to month.⁷⁶ Such a tenancy also arises where the tenant holds over after the expiration of a term for years, and pays rent by the month under a provision permitting the tenant to occupy the premises by the month after the expiration of the term,⁷⁷ or where the tenant was to have the premises as long as he paid the rent thereon, which was in terms payable monthly, and the landlord was to have the premises whenever he wanted them.⁷⁸ Similarly an agreement to let premises for one year from April 1st, the rent payable monthly, is simply a tenancy from month to month.⁷⁹ So, where a tenant for a term paid a month's rent and took a receipt for the same commencing at the expiration of the old term, the new tenancy was from month to month and it was not a renewal of the expired term.⁸⁰ An express provision in the lease that the tenancy may be determinable on a notice of a month or thirty days may sometimes determine the length of the term of a letting, as, for instance, a parol agreement made

⁷⁴ Pleasant Lessee of Hayton v. Benson, 14 East, 234.

⁷⁵ Hurd v. Whitsett, 4 Colo. 77; Wall v. Ellman, 2 Chest. Co. Rep. (Pa.) 178; Steffens v. Earl, 40 N. J. L. 128; State v. Schertinger, 51 N. J. L. 452.

⁷⁶ Sebastian v. Hill, 51 Ill. App. 272; Lehman v. Nolting, 56 Mo. App. 519; J. B. Barnaby Co. v. Johnston, 28 R. I. 105, 65 Atl. Rep. 613; Rogers v. Brown, 57 Minn. 223, 58 N. W. Rep. 981.

⁷⁷ McDevitt v. Lambert, 80 Ala. 536, 2 So. Rep. 438; Shirk v. Hoffman, 57 Minn. 230, 58 N. W. Rep. 990.

⁷⁸ Rogers v. Brown, 57 Minn. 223, 58 N. W. Rep. 981.

⁷⁹ Hungerford v. Wagoner, 5 App. Div. 590, 39 N. Y. Supp. 369.

⁸⁰ Baker v. Kinney (N. J.), 54 Atl. Rep. 526; Blumenberg v. Myers, 32 Cal. 93, 91 Am. Dec. 560; Alworth v. Gordon, 81 Minn. 445, 84 N. W. Rep. 454.

Before the expiration of a lease under seal for the occupation of the premises after the expiration of the lease until terminated by thirty days notice, converts the lease into a tenancy from month to month.⁸¹ A tenancy from month to month is created where the term of letting is for one month only and is to expire at noon on the first day of the following month, and the tenant holds over.⁸² The tenant is thereafter a tenant from month to month. And an entry into possession under a verbal letting with an agreement to pay rent by the month, which is void under the statute of frauds becomes a tenancy from month to month.⁸³ For if the term is not fixed in a parol letting, but a monthly rent is reserved, a tenancy from month to month and not from year to year usually arises.⁸⁴ A tenant who occupies the premises under a lease which is void because the element of mutuality is lacking is a tenant from month to month where he has an option to terminate the lease by a month's notice. And this presumption or construction is very materially strengthened by the fact that the tenant is to pay rent only for the period he actually occupies the premises.⁸⁵ So also a monthly hiring is created where a person having made a lease which is invalid under the statute of frauds, goes into possession and pays rent by the month. Ordinarily this would be a tenancy at will but the circumstance that the tenant pays by the month converts it into a lease from month to month.⁸⁶ Where a tenant for a term of years has an option to continue in possession as a tenant by the month at the expiration of his term, the tenant holding over at once becomes a tenant from month to month.⁸⁷ In one or two states of the Union it is expressly provided by the statute that a tenant going into possession under a lease which is void under

⁸¹ *West Chicago, etc., R. Co. v. Morrison*, 160 Ill. 288, 43 N. E. Rep. 393.

⁸² *Gibbons v. Dayton*, 4 Hun (N. Y.) 451; *Stoppelkamp v. Mangeot*, 42 Cal. 316.

⁸³ *Warner v. Hale*, 65 Ill. 395; *Brownell v. Welch*, 91 Ill. 523; *Donohue v. Chicago Bank Note Co.*, 37 Ill. App. 552; *Blake v. Kurrus*, 41 Ill. App. 562; *Marr v. Ray*, 151 Ill. 340, 37 N. E. Rep.

1029, 26 L. R. A. 799, affirming, 50 Ill. App. 415; *Utah Loan, etc., Co. v. Garbutt*, 6 Utah, 342, 23 Pac. Rep. 758.

⁸⁴ *Hollis v. Burns*, 100 Pa. St. 206, 45 Am. Rep. 379.

⁸⁵ *Sigmund v. Newspaper Co.*, 82 Ill. App. 178.

⁸⁶ *Sebastian v. Hill*, 51 Ill. App. 272.

⁸⁷ *McDevitt v. Lambert*, 80 Ala. 536, 2 So. Rep. 438.

the statute of frauds shall be taken and regarded as a tenant from month to month.⁸⁷ The fact that rent is payable quarterly and that the tenant gives security to pay one quarter's rent in advance, is conclusive that the tenancy is a quarterly tenancy and not a tenancy from year to year.⁸⁸

§ 106. **Tenancy from month to month by holding over.** A tenancy from month to month may be created by holding over. Thus a tenant under a lease for one month who holds over with the consent of his landlord and pays rent thereby creates a tenancy from month to month which can only be terminated upon one month's notice to quit.⁸⁹ And in Missouri a tenant of premises located in any city by holding over becomes under the statute a tenant from month to month.⁹⁰ Similarly where a tenant remained in possession of certain property two months after the expiration of his term, paying rent each month at the rate provided for in the lease, a mere tenancy from month to month is created.⁹¹ And a lease of premises for a certain term at a monthly rental, under which the tenant holds over for several months without a new agreement, paying the same rent constitutes such tenant a tenant from month to month.⁹² Where the lease specially provides that after the expiration of the term the holding shall be from month to month, the tenancy is one from month to month.⁹³ The fact that a tenant is distinctly told that if he holds over it must be as a tenant from month to month, a tenancy from month to month is created and no other contract of letting can be implied.⁹⁴

⁸⁷ Delany v. Flanagan, 41 Mo. App. 651.

⁸⁸ Wilkinson v. Hall, 4 Scott, 301, 3 Bing. (N. C.) 508, 3 Hodges, 56, 6 L. J. C. P. 82.

⁸⁹ Stopplekamp v. Mangeot, 42 Cal. 316; Shirk v. Hoffman, 57 Minn. 230, 58 N. W. Rep. 990.

⁹⁰ Drey v. Doyle, 28 Mo. App. 249; Smith v. Smith, 62 Mo. App. 596, 1 Mo. App. Rep. 580.

⁹¹ Backus v. Sternberg, 59 Minn. 403, 61 N. W. Rep. 335.

⁹² Branton v. O'Briant, 93 N. C. 99.

⁹³ Pappe v. Trout, 3 Okl. 260, 41 Pac. Rep. 397.

⁹⁴ Shipman v. Mitchell, 64 Tex. 174. A tenant who enters under a parol demise which is void under the statute of frauds and pays rent by the year becomes thereby a tenant from year to year, and the terms of the agreement, though it is void, is permitted to regulate all the other incidents of the tenancy from year to year, as, for example, the date when the yearly rent shall be payable, the amount of the rent and the time of the year when the tenant must quit. Schuyler v. Leggatt, 4 Cow. (N. Y.) 60.

§ 107. **The commencement of the monthly period.** The date upon which an entry is made upon the demised premises may, in the absence of an express agreement upon this point, indicate the day upon which the monthly period of tenancy shall commence. But usually either by custom or by an express agreement between the parties, the month begins with the first day of the next succeeding month to that in which the tenant moves into the premises, at least where the tenant does not move in or begin to pay rent on the first of that month. So, where a lessee went into possession on the sixth of the month and paid his rent up to the first of the following month the period of renting is from the first day of the month to the first day of the month.⁹⁵

§ 108. **The conversion of tenancies from month to month into tenancies from year to year.** Where a tenant enters into possession of premises under a lease which expressly states that it is from month to month, the court will refuse to convert his tenancy into a tenancy from year to year simply because he has continued in occupation for more than a year.⁹⁶ Similarly where a tenant from month to month holds over for more than a year, and the landlord elects to treat him as a tenant, he does not thereby become a tenant from year to year but continues under the terms of the former lease so far as applicable, and will presumptively remain a tenant from month to month in the absence of a new hiring for a different period.⁹⁷

§ 109. **The statutory rules creating a tenancy from month to month by a holding over.** An exception to the general rule that a parol lease, void under the statute of frauds, or a holding over creates a tenancy from year to year has been created by statute in some states of the Union. Thus in Missouri it is provided by statute that oral lettings of stores, shops, houses, tenements and other buildings in cities, towns, and villages shall be tenancies from month to month.⁹⁸ Hence where a lease of such premises which is invalid under the statute of frauds is made or where a tenant of such premises holds over after the termination of a lease for a definite period, he is a tenant from month to month under the statute. The statute being in derogation of

⁹⁵ Ver Steeg v. Becker-Moore Paint Co. (Mo. App., 1904), 80 S. W. Rep. 346.

⁹⁶ Jones v. Willis, 53 N. Car. 430.

⁹⁷ Hollis v. Burns, 100 Pa. St. 206.

⁹⁸ Missouri Rev. St. 1879, § 3078.

the common law will be strictly construed and it has been held inapplicable to the oral letting of land in a city, the buildings on which are the property of the tenant.⁹⁹ There is a somewhat similar statute in Louisiana applicable to estates which are usually tenancies at will. By the Louisiana statute it has been expressly provided that "if the renting of a house or other edifice or an apartment has been made without fixing its duration, the lease shall be considered to have been made by the month."¹ The effect of this statute is to make a holding over after the expiration of a term, in the absence of a new agreement, a mere tenancy from month to month.²

§ 110. **Tenancies from week to week.** It is very well settled that there may be a tenancy from week to week of land leased. This is aside from the letting of furnished rooms or apartments as lodgings where the rent is paid weekly and the occupant is a licensee. Whether a letting is from week to week in the absence of an express stipulation in the lease to that effect, depends largely upon the facts and circumstances in each case, the most important of which are the character and condition of the premises and the purpose for which they are to be used by the tenant. The payment of rent by the week is a suggestive fact though by no means conclusive. Where the contract is silent the court may imply a tenancy from week to week exists from the fact that the leased premises were a furnished house and that nothing was said in the lease about a quarterly letting or periodical payment of rent.³ Obviously no such implication of a weekly tenancy would usually arise in the case of an unfurnished house or in the case of the leasing of agricultural lands because the obvious purpose of the occupation of the tenant would be nullified by presuming a weekly hiring. Where the letting of premises was expressly from week to a week, a stipulation in the lease that after the expiration of the tenancy by the usual week's notice to quit the tenant shall have a reasonable time after the expiration of the term to remove his goods is valid. It operates also as a *quasi* extension of the term so as to give the tenant a

⁹⁹ Delany v. Flanagan, 41 Mo. App. 651.

¹ La. Code Act, § 2655.

² Bowles v. Lyon, 6 Rob. (La.) 262; Gehabee v. Stanly, 1 La. Ann.

17; Dolese v. Barbreath, 9 La. Ann. 352; Marmiche v. Roumieu, 11 La. Ann. 477.

³ Towne v. Campbell, 3 Com. Bench, 921.

right to enter and to do what is necessary to effect the removal.⁴ but obviously does not permit him to hold over from week to week. A provision that rent shall be payable at the rate of so much per week may indicate a weekly hiring, but where it is also provided that the rent is not to be increased during a particular period, the presumption of a tenancy from week to week is overcome.⁵

§ 111. **The necessity for a notice to quit at the common law.** At the common law a notice to quit must usually be given by the landlord prior to bringing ejectment in all cases of a tenancy from year to year.⁶ If, however, a lease is to end on a precise date, as where it is for one year or for a term of years, no notice to quit is required to be served by the landlord before bringing an action for ejectment.⁷ A tenant for a definite term is not entitled usually to a notice to quit. Where a lease has a definite time to run, or the term is to end at a certain time, a notice to quit is not necessary.⁸ In the case of a lease for a year or for a term of years, which is to expire on a day certain and fixed, no notice to quit is required to be served upon the tenant by the landlord but the term expires by its own limitation, and, as soon as the end of the term arrives, the landlord has a right to re-enter without delay or notice.⁹ So, too, where by the express terms

⁴ *Cornish v. Stubbs*, 39 L. J. C. P. 202, L. R. 5 C. P. 334, 22 L. T. 21, 18 W. R. 547.

⁵ *Adams v. Cairns*, 85 L. T. 10.

⁶ *Hollingsworth v. Stennett*, 2 Esp. 717, 5 R. R. 769; *Martin v. Watts*, 7 Term Rep. 83, 2 Esp. 501, 4 R. R. 387; *Moore v. Lawder*, 1 Stark. 308; *Warner v. Brown*, 8 East, 166, 9 R. R. 397; *Thomas v. Black*, 8 Houst. (Del.) 507, 18 Atl. Rep. 771; *Coomber v. Hefner*, 86 Ind. 108; *Elliott v. Stone State Bank*, 4 Ind. App. 155, 30 N. E. Rep. 537; *Moshier v. Kedwig*, 12 Me. 478; *Grant v. White*, 42 Mo. App. 285; *Hosli v. Yokel*, 58 Mo. App. 169; *Jackson v. Bryan*, 1 Johns. (N. Y.) 322; *Jackson v. Salmon*, 4 Wend. (N. Y.) 327; *Williams v. Ackerman*, 8 Or. 405;

Thomas v. Wright, 9 Serg. & R. (Pa.) 87; *Rich v. Keyser*, 54 Pa. St. 86. But see *Nelson v. Ware*, 57 Kan. 670, 47 Pac. Rep. 540.

⁷ *Cobb v. Stokes*, 8 East, 358, 9 R. R. 464; *Messenger v. Armstrong*, 1 T. R. 54, 1 R. R. 148; *Flower v. Darby*, 1 T. R. 162, 1 R. R. 169; *Tilt v. Stratton*, 4 Bing. 46, 1 M. & P. 183, 3 Car. & P. 164, 6 L. J. (O. S.) C. P. 50. See *Cox v. Sammis*, 68 N. Y. Supp. 203.

⁸ *Young v. Smith*, 28 Mo. 65; *Stephen v. Brown*, 56 Mo. 23.

⁹ *Canning v. Fibush*, 77 Cal. 196, 198, 19 Pac. Rep. 376; *Craig v. Gray*, 1 Cal. App. 598, 82 Pac. Rep. 699; *Reithman v. Brandenburg*, 7 Colo. 480, 4 Pac. Rep. 788; *Walker v. Ellis*, 12 Ill. 470; *Brownell v. Walsh*, 91 Ill. 523; *Fort v. Mc-*

of a lease the tenure of the tenant is to come at once to an end upon the happening of some contingent event, no notice to quit is essential and the term is absolutely at an end upon the occurrence of the event. Thus where it was agreed by an express provision in the lease of a mill that the term should end in case the machinery should break down no notice to quit is required and the term is at an end at once as soon as the machinery breaks down.¹⁰ But the right of the tenant under a lease from year to year to receive notice to quit and the reciprocal obligation of the landlord to give such notice are inseparable and essential incidents of the tenancy. The tenant may by his own conduct or by his acquiescence in and assent to, conduct on the part of the landlord, waive his rights to a notice to quit at the end of the current year. Such would be the case where the tenant abandoned the premises during the year and refused to pay rent for them. Indeed it has been held that a notice to quit is required to be given the tenant though the lease from

Grath, 7 Ill. App. 302; Frank v. Taubman, 31 Ill. App. 592; Alcorn v. Morgan, 77 Ind. 184, 786; McClure v. McClure, 74 Ind. 108, 110; Myerson v. Neff, 5 Ind. 523; Thomas v. Walmer, 18 Ind. App. 112, 46 N. E. Rep. 695; Hamit v. Lawrence, 2 A. K. Marsh. (Ky.) 366; Locke v. Coleman, 2 T. B. Mon. (Ky.) 12, 15, 15 Am. Dec. 18; Bowles v. Lyon, 6 Rob. (La.) 262; Chesley v. Welch, 37 Me. 106, 109; Preble v. Hay, 32 Me. 456; Clapp v. Paine, 18 Me. 264, 265; Stockwell v. Marks, 17 Me. 455, 35 Am. Dec. 266; Darrell v. Johnson, 17 Pick. (Mass.) 263; Danforth v. Sargeant, 14 Mass. 491; Ellis v. Paige, 2 Pick. (Mass.) 71; Wilson v. Wodd (Miss. 1904), 36 So. Rep. 609; Mastin v. Metzinger, 99 Mo. App. 613, 616, 74 S. W. Rep. 431; Horner v. Leeds, 25 N. J. Law, 106; Steffens v. Earl, 40 N. J. Law, 128, 133, 29 Am. Rep. 214; Allen v. Jaquish, 21 Wend. (N. Y.) 628; Gibbons v. Dayton, 4 Hun (N. Y.)

45; Logan v. Herron, 8 S. & R. (Pa.) 459; Cobb v. Stokes, 8 East, 358; Right v. Darby, 1 T. R. 159; Adams v. City of Cohoes, 53 Hun, 260, 6 N. Y. Supp. 611; Logan v. Herron, 8 Serg. & R. (Pa.) 459; Lane v. Nelson, 167 Pa. St. 602, 31 Atl. Rep. 864, 865; Mounts v. Goranson, 29 Wash. 261, 69 Pac. Rep. 740; Williams v. Bennett, 26 N. C. 122. Notice to quit is not usually required upon the expiration of a term of one year. But where a notice in writing is actually given by the landlord it may be admitted in evidence in an action by him to recover the possession brought subsequently to the expiration of the term. Snideman v. Snideman, 118 Ind. 162, 20 N. E. Rep. 723. One who occupies land under a mere license is not entitled to notice to quit, but can be ejected by the owner. Johns v. McDaniel, 60 Miss. 486.

¹⁰ Scott v. Willis, 122 Ind. 1, 22 N. E. Rep. 786.

year to year expressly provides that the term is to continue so long as the rent is paid.¹¹ A distinction has been made by the authorities as to the necessity for a notice to quit between that class of cases where the tenancy is of an indefinite duration or for an indefinite number of years as was the universal character of these tenancies from year to year in their original condition; and the class of tenancies from year to year which arises when a tenant holds over with the consent of his landlord after the expiration of a definite term. In the former class of cases, and particularly where the premises consisted of agricultural land, a six months' notice to quit was required from the landlord because of the fact that the tenant from year to year could not otherwise know at any time during the existence of his holding when his landlord might determine it. In theory a tenant from year to year under an indeterminate lease has in each current year a growing interest in the year next ensuing, which cannot be arbitrarily destroyed by his landlord without notice to quit. Where, however, a tenant holds over after the expiration of a definite term, and by so doing creates a tenancy from year to year, no year of the tenancy thus created by holding over arises out of or is connected with the year which precedes it but each year of the holding over creates a new and separate contract for a year between the parties which, being for a fixed and definite period may, according to the rule, be terminated without notice. The assent of both parties to the original lease is necessary to create the new lease from year to year by holding over. This assent on the part of the tenant is usually implied from the fact of his remaining in possession and paying rent after his term has expired. His action in vacating the premises and not electing to hold over is so clear a manifestation of his intention not to create a new yearly tenancy that no other notice on his part is required. And though by remaining in possession the tenant is presumed to offer to take the premises for another year, the landlord is not bound to accept the offer, and unless he does so by accepting rent or otherwise, the tenancy is terminated and notice to quit is not required to be given by him.¹² A notice to quit is not required to be served by a landlord in the

¹¹ Doe d. Warner v. Brown, 8 East, 165. See, also, as to necessity for a notice to quit, Gladwell

v. Holcomb, 60 Ohio St. 427, 54 N. E. Rep. 473.

¹² Gladwell v. Holcomb, 60 Ohio

case of a lease expressly "for one year" coupled with a further agreement that the term might continue as long as the parties should agree, where the tenant tells his landlord during any one of the yearly periods that he does not wish to hold for another year.¹³ Generally one who has entered upon land with the consent of the owner to cultivate it upon shares is a mere cropper and has no interest as a tenant in the land itself. His possession is the possession of the owner and his only right under this contract is to have a fair and equitable division of the crop. Hence he is not usually entitled to notice to quit nor need he serve notice to quit upon the owner.¹⁴

§ 112. **The length of time required for the notice to quit.** At the common law and in the absence of a statutory requirement prescribing a different time a six month's notice to quit is usually required in the case of tenancies from year to year.¹⁵ It has also been held that where the parties themselves have failed to stipulate what shall be the length of the notice to quit the matter may be regulated by the custom of the locality.¹⁶ The custom must be clearly proved and the burden of proof to show the custom is upon the tenant alleging its existence. It has also been held that a notice to quit must be given a reasonable time before the expiration of the calendar year.¹⁷ And that the question what is a reasonable time to give notice to quit under a lease from year to year is always a question for the determination of

St. 427, 437, 54 N. E. Rep. 473; *Adams v. City of Cohoes*, 127 N. Y. 175. But see *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. Rep. 745; *Robertson v. Simons*, 109 Ga. 360, 34 S. E. Rep. 604.

¹³ *Dunphy v. Goodlander*, 12 Ind. App. 609, 40 N. E. Rep. 924.

¹⁴ *Davies v. Baldwin*, 66 Mo. App. 577. And compare *Taft v. Hinchman*, 76 Mich. 672, 43 N. W. Rep. 680.

¹⁵ *Spalding v. Hall*, 6 D. C. 123; *Hamitt v. Lawrence*, 2 J. J. Marsh. (Ky.) 366; *Clapp v. Paine*, 18 Me. 264; *Hall v. Myers*, 43 Md. 446; *Danforth v. Sargeant*, 14 Mass. 491; *Brewer v. Knapp*, 18 Mass.

332; *Ellis v. Paige*, 19 Mass. 71; *Murray v. Armstrong*, 11 Miss. 209; *Critchfield v. Remaley*, 21 Neb. 178, 31 N. W. Rep. 687; *Godard v. Railroad Co.*, 2 Rich. (S. Car.) 346 (three months' notice); *Hanchet v. Whitney*, 1 Vt. 311, 315; *Doe d. Strickland v. Spence*, 6 East, 120; *Bridges v. Potts*, 17 C. B. N. S. 314, 333; *Goode v. Howells*, 4 M. & W. 199; *Right v. Darby*, 1 T. R. 162; *Doe v. Porter*, 3 T. R. 13; *Pitcher v. Donovan*, 1 Taunt. 555; *Martin v. Watts*, 7 T. R. 85.

¹⁶ *Roe v. Charnock, Peake*, N. P. C. 4.

¹⁷ *Hately v. Myers*, 96 Ill. App. 217.

the jury.¹⁸ In one case it was held that half a year's notice to quit in order to terminate a tenancy at will must be given either by the tenant or by his executor before an action of ejectment will lie.¹⁹ And the fact that the rent under a lease from year to year is payable quarterly does not dispense with the necessity for six months' notice to quit.^{19a} In the case of tenancies for periods running less than a year it has been well settled from an early date that, in the absence of statute, notice to quit is to be regulated by the term of the letting and must at least be equivalent to one rental period. Short terms less than a year are of modern origin as compared with terms for years and terms from year to year. The English judges have admitted that the rule of less than six months' notice is not based upon any judicial determination,²⁰ but have recognized and applied it as a custom growing out of the necessity of the case. For it was impracticable as well as unfair to both parties to these short terms to require from either of them the six months' notice that was demanded as a reasonable notice to quit in the case of tenancies from year to year. Nor was it fair to the parties to apply the rule of a notice of half the period which was required in the case of yearly holdings to these much shorter terms. But whatever may be the reason of the rule it has been repeatedly recognized and held by the courts of both the United States and England. In the case of a tenancy from month to month a notice to quit of at least one month must be served.²¹ The period of the notice to quit in the case

¹⁸ *Jones v. Spartanburg Herald Co.*, 44 S. Car. 526, 22 S. E. Rep. 731.

¹⁹ *Walker v. Constable*, 3 Wils. 25.

¹⁹ *Shirley v. Newman*, 1 Esp. 266, 5 R. R. 737.

²⁰ *Huffell v. Armistead*, 7 Car. & P. 56; *Towne v. Campbell*, 3 C. B. 921.

²¹ *McDevitt v. Lambert*, 80 Ala. 536, 2 So. Rep. 438; *Prickett v. Ritter*, 16 Ill. 96; *Seems v. McLees*, 24 Ill. 192; *Walker v. Sharp*, 14 Allen (Mass.) 43; *Greenewald v. Schaales*, 17 Mo. App. 324, 327

(by statute Mo. R. S. § 3978); *Steffens v. Earl*, 40 N. J. Law, 128, 134, 29 Am. Rep. 214; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391, 22 Wend. (N. Y.) 616; *Hungerford v. Wagner*, 5 App. Div. 590, 591, 39 N. Y. Supp. 369; *People ex rel. Botsford v. Darling*, 47 N. Y. 666; *Hollis v. Burns*, 100 Pa. St. 206, 45 Am. Rep. 379; *Teater v. King*, 35 Wash. 138, 76 Pac. Rep. 688, 690; *Yesler's Estate v. Orth*, 24 Wash. 483, 64 Pac. Rep. 723; *Doe d. Parry v. Hazell*, 1 Esp. 94; *Peacock v. Ruffun*, 6 Esp. 4.

of a monthly tenancy must expire with the end of some monthly term. The notice must be to quit at the end of the period.²² As regards the particular day upon which the tenant is notified to quit, it may be the day which corresponds with the date of the original letting.²³ If the tenancy begins on a particular day, the notice must be to terminate on the corresponding day of the succeeding month.²⁴ Apparently the notice to quit, in the absence of a statute, may be to quit on one of the recurring periods of the holding and if the notice be served on a day of the corresponding date in the preceding month, it will be sufficient.²⁵ On the other hand it has been held that a notice directing a monthly tenant to remove on the day his monthly term expires is both usual and proper. But a notice directing him to vacate on the following day is not insufficient or defective.²⁶

§ 113. **The length of the notice to quit in weekly and monthly tenancies.** By some of the English cases it has been laid down that, in the case of an ordinary weekly tenancy, a notice to quit is not by implication a part of the contract of hiring unless a usage to that effect binding on both parties is proved.²⁷ But the courts have very frankly admitted the manifest injustice of turning out a weekly tenant without notice to quit though clearly the necessity for notice is neither so apparent nor so urgent in the case of a monthly or a weekly tenant as it is in the case of a tenant from year to year of agricultural land. Hence it has been held that a week's notice to quit is indispensable and sufficient in the case of a tenancy from week to week and that such tenancy can be terminated only by such notice.²⁸ And if

²² Fox v. Nathan, 32 Conn. 348; Steffens v. Earl, 40 N. J. Law, 128, 135, 29 Am. Dec. 214; Hungerford v. Wagner, 5 App. Div. 590, 592, 39 N. Y. Supp. 369; People ex rel. Bottsford v. Darling, 47 N. Y. 666.

²³ Doe d. Eyre v. Lambly, 2 Esp. 635; Kemp v. Derrett, 3 Camp. 510; Roe v. Ward, 1 H. Black. 97; Doe v. Weller, 7 T. R. 478; Mills v. Goff, 14 Mee. & Wel. 72; Doe d. Cornwell v. Mathews, 11 C. B. 675.

²⁴ Russell v. McCartney, 21 Mo. App. 544.

²⁵ Steffens v. Earl, 40 N. J. Law,

134, 29 Am. Rep. 214; Baker v. Kenney, 69 N. J. Law, 180, 54 Atl. Rep. 526.

²⁶ Searle v. Powell, 89 Minn. 278, 94 N. W. 868.

²⁷ Towne v. Campbell, 3 Com. Bench. 921; Huffell v. Armistead, 7 Car. & P. 56. See, also, Jones v. Mills, 10 Com. Bench (N. S.) 788, 797; Sandford v. Clarke, 57 L. J. Q. B. 507, 21 Q. B. D. 398, 59 L. T. 226.

²⁸ Steffens v. Earl, 40 N. J. Law, 128, 134, 16 Atl. Rep. 186; Harvey v. Copeland, 30 L. R. Ir. 412; Jones

it be said that a tenant from week to week is entitled only to a reasonable notice to quit and the question as to what is a reasonable notice be left to the jury where it belongs, it cannot be doubted that they would be guided by evidence of a usage or give a notice of the length of the term in all cases of weekly or monthly tenancies and that evidence of such a custom would be received by the court.²⁹

§ 114. **The statutory regulations of notice to quit.** In many of the states of the United States the length of time which is required in the notice to terminate the tenancy is fixed by statute, and the duty of giving this notice is reciprocal. Hence either party to the lease who desires to terminate it must cause the required notice to quit to be served on the other. Iowa, Con-

v. Mills, 10 Com. Bench (N. S.) 788, 30 L. J. C. P. 66, 8 Jur. (N. S.) 387; Doe d. Peacock v. Raffan, 6 Esp. 4; Bowen v. Anderson (1894), 1 Q. B. 164, 10 R. 47, 42 W. R. 236, 58 J. P. 213.

²⁹ As to length of notice to quit in the case of monthly tenancies, see Doe d. Parry v. Hazell, 1 Esp. 94; and Beamish v. Cox, 16 L. R. Ir. 270, affirmed, 16 L. R. Ir. 458.

³⁰ Pulliam v. Sells (Ky., 1906), 99 S. W. Rep. 289. In Huffell v. Armistead, 7 C. & P. 56, the court, by Parke, Baron, said: "The only question is whether the tenancy commenced on the Saturday or Monday. If it commenced on the Monday, I think the defendant, who entered on that day, was at liberty to quit on the same day in another week. I cannot say a week has been exceeded by holding six days and two fractions of a day. Upon the question of a notice to quit, the law is clearly settled that a yearly tenancy cannot be determined without a half year's notice. But that rule cannot be applied to a weekly taking, for the effect of it would be to show that a half week's notice

was necessary to put an end to such a tenancy. I am not aware that it has ever been decided that in the cases of an ordinary monthly or weekly tenancy that a month's or a week's notice must be given. A tenant who enters upon a fresh week may be bound to continue until the expiration of that week or to pay the week's rent, but this is a very different thing from giving a week's notice to quit." In Parry v. Hazell, 1 Esp. 94, the tenant took a house by the month and he had a month's notice to quit, which the court held sufficient. In the case of Peacock v. Ruffin, 6 Esp. 4, which was an action of ejectment under a weekly hiring, it appeared that a week's notice to quite had been given. As it appeared from the evidence that the landlord had agreed to give the tenant four weeks' notice, he was nonsuited, Lord Ellenborough saying: "A week's notice is certainly sufficient where the holding is weekly, but the rule of law as to the legality of notice is still controllable by the agreement of the parties."

necticut, Illinois and Wisconsin require thirty days,³¹ Missouri, sixty days,³² Mississippi, two months,³³ Kentucky and Oregon, ninety days.³⁴ Delaware, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, North Carolina, Pennsylvania and Rhode Island require three months' notice to quit.³⁵ Virginia requires three months' notice for land within a town or city and six months for land not so situated;³⁶ Maryland requires six month's notice to quit in the counties,³⁷ while the North Dakota and Oklahoma statutes provide for notice at least as long before the expiration of the term as the term of the hiring itself, not exceeding one month.³⁸ The other states have apparently failed to provide by statute the length of time in which notice must be given to terminate a tenancy from year to year, so it may be presumed that they follow the common law requirement as to such notice which is six months.³⁹

³¹ *Larkin v. Avery*, 23 Conn. 304; Iowa Code 1897, § 2991; S. & B. Ann. St. § 2187, construed in *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. Rep. 545; *Cleighton v. Sanders*, 89 Ill. 543.

³² Mo. Rev. St. 1899, p. 987, § 4109. A month's notice to quit will not terminate the tenancy. *Ridgely v. Stillwell*, 25 Mo. 570; *Wheat v. Brown*, 64 Mo. App. 505, 43 Pac. Rep. 807.

³³ Miss. Ann. Code 1892, § 2544.

³⁴ Ky. St. 1894, §§ 2295, 2296; Misc. Laws Or. Code, § 11, sub. 2, § 13, p. 615, in the case of farm lands. The notice prescribed in Oregon Code, § 2987, for the termination of estates at will, applies also to the termination of estates from year to year. *Rosenblat v. Perkins*, 18 Or. 156, 22 Pac. Rep. 598.

³⁵ Del. Rev. Code 1893, c. 120, § 4; Ind. Rev. St. 1881, §§ 5208, 5209, construed in *Elliott v. Stone City Bank*, 4 Ind. App. 155, 30 N. E. Rep. 537; Kan. Gen. St. 1889, § 55; *Wheal v. Brown*, 3 Kan.

App. 431, 43 Pac. Rep. 807; *Ware v. Nelson*, 4 Kan. App. 258, 45 Pac. Rep. 923; *Gordon v. Gilman*, 48 Me. 473; *Withers v. Larrabee*, 48 Me. 570 (no statute in this state). Mass. Rev. Laws 1902, c. 129, § 12; Mich. Comp. Laws 1897, § 9257; Minn. St. 1894, § 5873; *Hunter v. Frost*, 47 Minn. 1, 49 N. W. Rep. 327; N. H. Rev. St. c. 209; *Currier v. Perley*, 24 N. H. 219; N. J. Gen. St., p. 1921, § 29; *Snowhill v. Snowhill*, 23 N. J. L. 447; N. C. Pub. St. 1873, c. 64, § 9; *Vincent v. Corbin*, 85 N. C. 108.

³⁶ Va. Code 1887, § 2785; *Crawford v. Morris*, 5 Gratt. (Va.) 90, 107; *Harrison v. Middleton*, 11 Gratt. (Va.) 527, 532.

³⁷ Md. Pub. Gen. St. art. 53, § 6.

³⁸ N. Dak. Rev. Code, § 4085; Okl. Rev. Stat., § 868.

³⁹ *Goddard v. South Carolina R. Co.*, 2 Rich. L. (S. C.) 346; *Brown v. Kayser*, 60 Wis. 1, 18 N. W. Rep. 523.

§ 115. The necessity and the sufficiency of a notice to quit in the case of tenancies from month to month. In order to terminate a tenancy from month to month, a notice to quit is usually necessary. In the absence of a statutory provision or of a stipulation in the lease requiring a longer notice, a tenant from month to month is entitled to one month's notice to quit.⁴⁰ A notice to quit given on May 31st to quit within thirty days and not later than June 30th is sufficient to terminate a monthly tenancy.⁴¹ The notice to quit in the case of a monthly tenancy must be served before the beginning of the succeeding rental month, so that a notice served on June 1st is insufficient to terminate the tenancy on July 1st.⁴² Where a statute requires the notice to quit to be given to terminate a tenancy from month to month a mere tender of the keys of the premises is not equivalent to the statutory notice.⁴³ The notice should be to quit at the end of one of the recurring periods of the holding and if served on the corresponding date of the preceding month is sufficient.⁴⁴ But while it is proper to notify a tenant from month to month to quit on the day upon which his tenancy expires, still the sufficiency of the notice is not affected by the fact that it orders him to vacate the premises on the day following the last day of the month.⁴⁵

§ 116. The statutory regulations of the notice to quit in tenancies from month to month. In California in the case of

⁴⁰ *McDevitt v. Lambert*, 80 Ala. 536, 2 So. Rep. 438; *Stewart v. Murrell*, 65 Ark. 471, 47 S. W. Rep. 130; *Eberlein v. Abel*, 10 Ill. App. 626; *Donohue v. Chicago Bank Note Co.*, 37 Ill. App. 552; *Seem v. McLees*, 24 Ill. 192; *Coffin v. Lunt*, 69 Mass. 80; *Steffens v. Earl*, 40 N. J. L. 128, 29 Am. Rep. 214; *Rivett v. Brown*, 6 Wkly. L. Bul. (Ohio) 378; *Wall v. Ullman*, 2 Chest. Co. Rep. (Pa.) 178; *Williams v. McAnany*, 12 Pa. Co. Ct. 191; *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. Rep. 723; *Fratcher v. Smith*, 104 Mich. 537, 62 N. W. Rep. 832; *Hart v. Lindley*, 50 Mich. 20; *Baker v. Kenney*, 69 N. J. L.

180, 54 Atl. Rep. 526; *Klingenstein v. Goldwasser*, 58 N. Y. Supp. 342, 27 Misc. 536; *Hungerford v. Waggoner*, 39 N. Y. Supp. 369, 5 App. Div. 590. But see *Teater v. King*, 35 Wash. 138, 76 Pac. Rep. 688.

⁴¹ *Leahy v. Liebman*, 67 Mo. App. 191.

⁴² *Corby v. Brill Book, etc., Co.*, 76 Mo. App. 506.

⁴³ *Minn. Gen. St.* 1878, c. 75, § 40, construed in *Finch v. Moore*, 50 Minn. 116, 52 N. W. Rep. 384.

⁴⁴ *Baker v. Kinney* (N. J.), 54 Atl. Rep. 526.

⁴⁵ *Searle v. Powell*, 89 Minn. 278, 94 N. W. Rep. 868.

monthly tenancies⁴⁶ fifteen days' notice to quit is required by statute. In Minnesota,⁴⁷ Missouri,⁴⁸ and New Hampshire,⁴⁹ the statutes require the giving of a month's notice to terminate a monthly tenancy. In Illinois⁵⁰ and in Colorado a ten days' notice to quit is sufficient in the case of monthly tenancies.⁵¹ Louisiana and Rhode Island require by statute fifteen days⁵² and Maryland requires a thirty days' notice in the city of Baltimore.⁵³ In New York a five days' notice to quit is sufficient both in yearly and monthly tenancies.⁵⁴ A government lease of property in the District of Columbia can be terminated only by giving one month's notice and giving up possession of the property as required by law.⁵⁵

§ 117. **Notice to quit when required by the express terms of the lease.** In some cases the parties to a written lease in explicit terms provide for the notice to quit. A provision in the lease for a notice to quit supersedes the statutory requirement for such a notice in the absence of a direction to the contrary by the parties to the lease. Thus the parties will be bound to give a notice to quit according to the character of the notice mentioned in the lease though it may differ in the length of time from the period mentioned in the statute. So, if the lease requires a thirty day notice to quit to be given on the sale of the premises by the landlord, such notice must be given though the

⁴⁶ Civil Code, § 827; McDonough v. Starbird, 105 Cal. 15.

⁴⁷ Gen. St. 1878, c. 75, § 40; Shirk v. Hoffman, 57 Minn. 230, 38 N. W. Rep. 990.

⁴⁸ Mo. Rev. St. 1879, § 3078; Withnell v. Petzold, 104 Mo. 409; Smith v. Smith, 62 Mo. App. 556, 1 Mo. App. Rep. 580; Drey v. Doyle, 28 Mo. App. 249; Gunn v. Sinclair, 52 Mo. 327; Koken Iron Works v. Kinealy, 86 Mo. App. 199.

⁴⁹ Blair v. Macon, 64 N. H. 487.

⁵⁰ Eberlein v. Abel, 10 Ill. App. 626.

⁵¹ Mills Ann. St., § 1976, construed in Salomon v. O'Donnell, 5 Colo. App. 35, 36 Pac. Rep. 893;

Edmundson v. Preville, 12 Colo. App. 73, 54 Pac. Rep. 394.

⁵² La. Civ. Code, art. 2655, construed in Bowles v. Lyon, 6 Rob. (La.) 262; R. I. Pub. St., c. 232, § 3; Comstock v. Cavanagh, 17 R. I. 233, 21 Atl. Rep. 498.

⁵³ Md. Code, art. 4, §§ 885, 886, construed in Kinsey v. Minneck, 43 Md. 112. A tenant in the enjoyment of premises of which he is in rightful possession and entitled to remain in such possession will be duly protected by a court of equity until he is served with statutory notice to quit. *Hately v. Myers*, 96 Ill. App. 217.

⁵⁴ Code Civ. Proc. § 2231.

⁵⁵ Spofford v. United States, 32 Ct. Cl. 452.

statute permits a three days' notice under ordinary circumstances.⁵⁶ Where a lease requires a notice to quit of a particular character to be given in the event of a certain contingency a statutory notice to quit is proper under other circumstances. A provision in a lease requiring a notice of a particular description differing in the length of time from the statutory notice will be strictly construed. A provision in a lease for a term of years that it may be terminated at the expiration of one year on sixty days' notice means a notice of sixty days to terminate at the end of the first year and the first year having passed, the right to terminate on notice is gone.⁵⁷ If the lease for years is silent as to when the period of notice shall expire, the notice should be to quit at the expiration of the year or some other rental period. Thus a three months' notice to quit, expressly provided for by the lease must expire on the day which is the anniversary of the commencement of the lease, in the absence of any provision to the contrary.⁵⁸ Where a lease provides that it shall be subject to three months' notice on either side at any time to terminate the agreement, the notice may be given at any time, though the rent be payable quarterly, if it is not clearly apparent that the hiring is from year to year,⁵⁹ in which latter case the notice to quit must be given to terminate on a rent day. A tenant who is under an agreement to vacate the premises upon their sale by the landlord is entitled to receive notice that they have been sold. He must have reasonable notice. The notice may properly be given him by the purchaser. The length of time which the tenant may need to secure premises of a like character is no criterion of what may be a reasonable notice. Under such circumstances a thirty days' notice will be regarded as sufficient.⁶⁰

§ 118. **The form and the character of the notice to quit.** Ordinarily a notice to quit, particularly where the lease is in writing ought itself to be in writing. But a parol notice to quit

⁵⁶ *Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 266, 82 Pac. Rep. 85. 1 K. B. 444, 90 L. T. 122, 20 T. L. R. 159.

⁵⁷ *M. Fine Realty Co. v. City of New York*, 103 N. Y. Supp. 115. ⁵⁹ *Soames v. Nicholson*, 71 L. J. K. B. 24, (1902) 1 K. B. 157, 85 L. T. 614, 50 W. R. 169.

⁵⁸ *Dixon v. Bradford and District Railway Servants' Coal Supply Co.*, 73 L. J. K. B. 136, (1904) ⁶⁰ *Cooper v. Gambill*, 146 Ala. 184, 40 So. Rep. 827.

given by a tenant who is holding under a parol lease has been held sufficient.⁶¹ So an oral notice to quit given by an employee of a corporation to its tenants is *prima facie* sufficient without any affirmative evidence of the agent's authority to give it.⁶² though his lack of authority may be shown by the tenant. The giving of an oral notice to quit by the tenant which is received without objection by the landlord is a waiver of the right of the landlord to have a written notice to quit.⁶³ A written notice to quit need not be directed to the tenant *eo nomine* if it is proved to have been delivered to him at the proper time.⁶⁴ So, any error in the direction of the notice to quit either in the address or in designating the tenant or describing the premises will be cured by the tenant's retention without objection of the notice to quit.⁶⁵ So a mere variance in the notice from the description of the premises contained in the lease will not invalidate a notice to quit where the tenant was not misled thereby.⁶⁶ In all cases where the party served with a notice to quit claims that it is irregular either in form or in the manner of its service he ought to return it to the party within a reasonable time indicating his objection to it. His retention of an irregular or informal notice to quit particularly in a case where the other party is prejudiced thereby may be regarded as a

⁶¹ Eberlein v. Abel, 10 Ill. App. 626; Timmins v. Rawlinson, 3 Burr. 1603, 1 W. Bl. 533; Doe d. Macartney v. Crick, 5 Esp. 196, 8 R. R. 848.

⁶² Doe d. Rochester v. Pierce, 2 Camp. 96.

⁶³ Smith v. Snyder, 168 Pa. St. 541, 32 Atl. Rep. 64, in this case the tenant in informing the agent of the landlord of his intention to quit told him he would hold from month to month, and the agent replied he would see his principal and would let the tenant know what the landlord would do before the end of the term but neglected to do so.

⁶⁵ Doe v. Spiller, 6 Esp. 70, 9 R. R. 810. As to the validity of a notice required under a lease

where the signature was omitted from the notice to quit, see Carleton v. Herbert, 14 W. R. 772. A notice to quit is not invalidated by a mistake in the Christian name of the tenant if he or his family on receiving it understand it to be intended for him and retain it. Clark v. Keliher, 107 Mass. 406. The date given in a written notice to quit is immaterial except when the period of notice is to run from such date. The date of its service is usually controlling, and this may always be shown by parol evidence under general rules.

⁶⁶ Consolidated Coal Co. v. Schaefer, 135 Ill. 210, 25 N. E. Rep. 788.

waiver of the irregularity or informality in form or mode of service. If a landlord accepts a notice to determine a tenancy as such at the time of its service, the fact that the notice is imperfectly expressed does not affect its validity.⁶⁷ The courts will always consider the substance rather than the form of the notice to quit and will usually disregard all technical irregularities and informalities provided it shall appear that the party who was served with the notice to quit has not been misled or prejudiced thereby. A notice to quit served on the tenant ought to be signed by the landlord or his agent duly authorized to do so.⁶⁸ The notice must not be conditional, but absolute and positive. A notice by a tenant that he would quit unless the landlord would repair is not a good notice to quit.⁶⁹ So, a notice served by a landlord upon the tenant that he must quit or pay an advanced rent, or make repairs, or do any other thing in the alternative which will be a condition of his remaining in possession is not a good or proper notice to quit.

§ 119. **The construction of the language of the notice to quit.** The courts will construe the language of the notice to quit in a reasonable manner. If the meaning of the language is doubt-

⁶⁷ General Asur. Co. v. Worsley, 15 Reports, 328.

⁶⁸ A notice prepared and signed by a clerk of the authorized agent of the owner, and with the owner's and agent's names signed by the direction of the agent, is sufficient. Bond v. Chapman, 34 Wash. St. 606, 609, 76 Pac. Rep. 97.

⁶⁹ Baltimore Dental Ass'n v. Fuller, 101 Va. 627, 44 S. E. Rep. 771, 772. A notice to quit, given by or in behalf of the landlord, may be in the following form, the words in parenthesis being used when the notice is by an agent: "To Mr. A. B. I hereby (as agent for and on behalf of Mr. D. E., your landlord) give you notice to quit and deliver up the possession of the premises, situate at _____ in the county of _____, city and state of _____ (adding street and

street number when possible), which you now hold of me (him) on the — day of —, 190—, next, or at the expiration of the year of your tenancy thereof, which shall expire next after the end of one half-year from the date of this notice. Dated the — day —, 190—. D. E." A notice to quit, given by or on behalf of the tenant, may be in the following form, the words between parenthesis being used when the notice is given by an agent: "To E. F. I hereby (as agent for and on behalf of Mr. C. D., your tenant) give you notice that on the — day of — next I shall (he will) vacate No. —, —, street, city of —, county of —, state of —, which I (he) now hold (holds) of you as tenant thereof. Dated, the — day of —, 190—."

ful or if it is ambiguous, the court will so construe it to make it sensible rather than declare it void. The intention of the person who signs the notice to quit, if it be apparent from the whole notice, will prevail over minor inconsistencies in the notice.⁷⁰ The notice to quit must be such when it is given that the tenant could safely act under it. And if he could not, i. e., if the notice as given was not the act of the landlord and not binding on him, it is extremely doubtful whether any subsequent ratification by the landlord will validate it and make it binding upon the tenant. A statutory notice to quit must usually be in writing and must contain a description of the premises sufficiently certain for identification. It ought also to require the tenant to remove from the premises on the specified day.⁷¹ The notice to quit should include the whole premises, and a notice to quit only a part of the premises where the whole are held under the one lease is insufficient to terminate the tenancy.⁷² Whether the notice to quit must be absolute or whether it may be conditional has been differently decided. A notice to quit delivered by the landlord to the tenant "unless he (the tenant) desires to remain" upon the terms proposed by the landlord has been held a sufficient notice.⁷³ But on the other hand, a notice by the landlord that he would not renew the tenant's term unless the latter agreed to make repairs is not a sufficient notice to quit. It was held that the notice to quit ought to be absolute and not in the alternative.⁷⁴

§ 120. **To whom notice must be given.** The notice to quit when given by a landlord must usually be served on the actual tenant. Notice to quit to one of several lessees holding as ten-

⁷⁰*Doe v. Culliford*, 4 Dowl. & Ry. 248. Under Conn. Gen. St., § 1355, which provides that a notice to quit shall be "substantially" in the following form, "I (or we) hereby give you notice that you are to quit possession of the premises now occupied by you," a notice that "you are hereby notified to quit possession" of certain premises on or before a given date, duly signed, is sufficient. *Miller*

v. Lampson, 66 Conn. 432, 34 Atl. Rep. 39.

⁷¹*McClung v. McPherson*, 47 Oreg. 73, 81 Pac. Rep. 867, 82 Pac. Rep. 13.

⁷²*Alworth v. Gordon*, 81 Minn. 445, 84 N. W. Rep. 454.

⁷³*Candler v. Mitchell*, 119 Mich. 564, 78 N. W. Rep. 551.

⁷⁴*Baltimore Dental Association v. Fuller*, 101 Va. 627, 44 S. E. Rep. 771.

ants in common has been held sufficient and binding on all.⁷⁵ Where a lease is to several persons as lessees, if one of them, acting for himself only, remains in possession after the expiration of the term, a notice to quit addressed to him alone is sufficient to terminate the tenancy resulting from his holding over.⁷⁶ A party found in possession who entered after a tenant had vacated, may, in the absence of evidence to the contrary, be presumed to be in as the tenant's assignee so that notice to quit may properly be served upon him.⁷⁷ It is a safe and advisable rule to serve notices to quit upon all persons who may be upon the premises though the landlord may know they are not his tenants. Their status ought to be accurately described in the notice to quit as for example, that they are occupants or sub-tenants, though a misdescription where no one has been misled will not estop the landlord. A notice to quit ought to be served upon all under tenants as such by the superior landlord. But where on notice being given to a lessee, he serves notices to quit on his under tenants and the lessee then quits so much of the premises as is occupied by himself, but his under tenants do not quit, ejectment may be maintained against the lessee by the original lessor for so much of the premises as the under tenants continue to occupy. The possession of the under tenant is the possession of the lessee.⁷⁸ On the other hand, it has been held that though the service of a notice to quit on sub-tenants may be prudent and advisable, it may be regarded as sufficient service to deliver a notice to quit personally to the original lessee. His lessee takes subject to the rights of his lessor against him and the under tenant is bound by a notice to quit though it be not served on him.⁷⁹ The rules which are applicable to the service of a no-

⁷⁵ Doe d. Macartney v. Crick, 5 Esp. 196, 8 R. R. 848: As to a case where one tenant lived elsewhere than the premises in question. Doe d. Bradford v. Watkins, 7 East, 551, 3 Smith, 517, 8 R. R. 670.

⁷⁶ Tice v. Cowenhoven, 63 N. J. L. 24, 42 Atl. Rep. 1054.

⁷⁷ Doe d. Morris v. Williams, 6 B. & C. 41, 9 D. & R. 30, 30 R. R. 244.

⁷⁸ Roe v. Wiggs, 2 Bos. & P. (N. S.) 330.

⁷⁹ Schilling v Holmes, 23 Cal. 227. In New York it is not necessary to serve a notice on sub-tenants under Laws 1882, c. 303, requiring notice to a monthly tenant of the landlord's election to terminate the tenancy as a prerequisite to summary proceedings. Decker v. Sexton, 43 N. Y. Supp. 167, 19 Misc. Rep. 59.

tee to quit by the landlord upon his tenant are also applicable to the service of a notice to quit by a tenant on his landlord. A lessee of land from tenants in common must serve notice of his intention to quit on all the lessors who hold as tenants in common.⁸⁰ But notice to quit by a tenant served on one of several joint lessors would probably be sufficient. And there being no privity of contract or estate between a sub-tenant and the original landlord, the service of a notice to quit by a sub-tenant upon the original landlord may be dispensed with. A notice to quit in the case of a corporation being tenants, may be served upon its treasurer,⁸¹ or other officer qualified to receive service of court process. A statutory requirement that notice to quit shall be served on "any person in possession" is not fulfilled by a service on any other person than the lessee.⁸²

§ 121. **By whom the notice to quit must be given.** As a general rule only that person who is the immediate owner of the reversion can serve a notice to quit. A landlord who during a tenancy from year to year grants a lease of the same premises to a third person for a term of years cannot thereafter serve on the yearly tenant a valid notice to quit.⁸³ In such case the notice to quit must be served by the tenant for years who after he has received his lease, stands in the place of the landlord so far as the tenant from year to year is concerned. A notice to quit signed by one of two or more joint lessors is valid and binding on all of them. In one case it has been held that a notice to quit in the names of all of the joint lessors but signed by only one is a good notice to quit.⁸⁴ And so, too, such a notice given by an agent authorized to do so by one of several joint lessors determines the tenancy as to all the lessors.⁸⁵ On the other hand, it was held that a notice to quit to a tenant from year to year from joint lessors must be signed by all the joint lessors at the time it is served, if it is given by one of them, but if given by an

⁸⁰ *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. Rep. 938. *Long Bros. v. Bolen Coal Co.*, 56 Mo. App. 605.

⁸¹ *Lindeke v. Associates Realty Co.*, 77 C. C. A. 56, 146 Fed. Rep. 620. Also holding that a statute regulating the service of summons on a corporation is applicable to the service of a notice to quit.

⁸² *Baragiano v. Villani*, 117 Ill. App. 372.

⁸³ *Wordsley Brewery Company v. Halford*, 90 L. T. 89.

⁸⁴ *Elliott v. Hulme*, 2 M. & Ry., 483, 6 L. J. (O. S.) K. B. 345.

⁸⁵ *Kindersley v. Hughes*, 7 Mee. & Wel. 139, 10 L. J. Ex. 185.

agent on behalf of the joint tenants, if his authority is recognized by all of them subsequently, it is sufficient.⁸⁶ But a notice to quit given by two of three joint trustees who are lessors, is bad, though all three are named and the third afterwards adopts it and joins in the ejectment.⁸⁷ On the other hand it has been held where four trustees under a deed of trust were joint landlords of a house, that a notice to quit served on the tenant but signed by only three of them was sufficient to put an end to the connection between all the parties as landlords and tenant.⁸⁸ If four joint tenants enter into a joint lease from year to year, such of them only as give notice to quit may recover their several shares in ejectment.⁸⁹ A notice to quit leased premises owned by two tenants in common, signed and served by one, acting for both, with the knowledge of the lessee, is sufficient.⁹⁰ A notice to quit signed by one of the several joint tenants on behalf of the others will terminate a tenancy from year to year as to all.⁹¹ A general agent may give a valid notice to quit in his own name, but it is otherwise if given by an agent holding only a special or limited authority.⁹² An infant who has become entitled to the reversion of an estate leased from year to year, must give notice to quit before he can eject the tenant.⁹³ A notice to quit signed by a mortgagor who had a general authority from the mortgagee to determine tenancies, is sufficient to determine a tenancy created before the mortgage, even though the notice does not purport on the face of it to be on behalf of the mortgagee.⁹⁴ But a mortgagor who remains in possession after the day of default has passed, and received the rents and has given receipts in his own name, cannot by notice to quit, signed by himself only, determine a tenancy, which existed at the time of the execution of the mortgage.⁹⁵

⁸⁶ *King v. Woodward*, 3 B. & Ald. 689; *Jolliffe v. Sybourn*, 2 Esp. 677.

⁸⁷ *Fisher v. Cuthell*, 5 East, 491, 2 Marsh. 83, 5 Esp. 149, 7 R. R. 752.

⁸⁸ *Alford v. Vickery*, Car. & M. 280.

⁸⁹ *Whayman v. Chaplin*, 3 Taunt. 120, 12 C. R. 615.

⁹⁰ *Earl Orchard Co. v. Fava*, 138 Cal. 76, 70 Pac. Rep. 1073.

⁹¹ *Aslin v. Summersett*, 1 B. & Ald. 135, 8 L. J. (O. S.) K. B. 369.

⁹² *Jones v. Phipps*, 9 B. & S. 761, 22 L. J. Q. B. 198; L. R. 3 Q. B. 303, 18 L. T. 813, 16 W. R. 1044.

⁹³ *Baker v. White*, 2 Term Rep. 159, 1 R. R. 453.

⁹⁴ *Stackpoole v. Parkinson*, Ir. R. 8 C. L. 561.

⁹⁵ *Miles v. Murphy*, Ir. R. 5 C. L. 382.

§ 122. The date upon which the period stated in the notice must terminate. Where a notice to quit is given at common law or where by statutory provision a tenancy from year to year can be terminated only by a notice to quit given at a specified date during the pendency of the lease it is always necessary that the period for which the notice was given should terminate at the expiration of the current year, or month, in case the tenancy is from month to month.^{96a} A tenancy from year to year in South Carolina looks to the end of the calendar year for its termination without regard to the time of the commencement of the tenancy.⁹⁷ But it has been held that a notice to quit "at the expiration of the year's tenancy" is sufficient, although it does not appear on the face of it that it was given six months before the period therein specified for quitting.⁹⁸ And a notice to quit on the anniversary of the day "at" or "on" or "from" or "on and from" which the tenancy commenced is generally good.⁹⁹ When the lease expressly provides that the notice to

⁹⁶ *Hessher v. Moss*, 50 Miss. 208; *Prouty v. Prouty*, 5 How. Pr. (N. Y.) 81; *Finkelstein v. Herson*, 55 N. J. Law, 217, 26 Atl. Rep. 638; *Lloyd v. Cozens*, 2 Ashm. (Pa.) 131; *Lesley v. Randolph*, 4 Rawle (Pa.) 123; *Dumn v. Rothermel*, 112 Pa. St. 272; *Peehl v. Bumbalek*, 99 Wis. 62; *Godard v. South Carolina R. Co.*, 2 Rich. Law (S. C.) 346; *Floyd v. Floyd*, 4 Rich. Law (S. C.) 23; *Phoenixville v. Walters*, 147 Pa. St. 501, 23 Atl. Rep. 776; *Flower v. Darby*, 1 Term Rep. 159; *Rigge v. Bell*, 5 Term Rep. 471; *Phillips v. Butler*, 2 Esp. 589; *Castleton v. Samuel*, 5 Esp. 173; *Pitcher v. Donovan*, 2 Campb. 78; *Thompson v. Maberly*, 2 Campb. 573; *Mathewson v. Wrightman*, 4 Esp. 5, 6 R. R. 834; *Hinde v. Vince*, 2 Campb. 256; *Doe v. Brookes*, 2 Campb. 257; *Spicer v. Lea*, 1 East, 312, 4 Kent. Com. 113.

^{96a} *Hart v. Lindley*, 50 Mich. 20; *Hogsett v. Ellis*, 17 Mich. 366;

Shaw v. Hoffman, 25 Mich. 163; *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 214. Where in a tenancy from month to month the month commences on the first day a notice served before the day named in it requiring the tenant to quit on the last day of the month is sufficient. *Petsch v. Biggs*, 31 Minn. 392. A statute which provides that a notice to quit shall end with the month in the case of a monthly tenancy must be strictly observed. Hence a notice to quit at the end of thirty days given during a month for which rent has been paid in advance is invalid as regards the month in which it was given. *Simmons v. Jarman*, 122 N. C. 195, 29 S. E. Rep. 332.

⁹⁷ *Wilson v. Rodeman*, 30 S. C. 210; *Floyd v. Floyd*, 4 Rich. (S. C.) 23.

⁹⁸ *Gorst v. Timothy*, 2 Car. & K. 351.

⁹⁹ *Sidebotham v. Holland*, 64 L.

quit may be given at any time, it is not necessary that the period of the notice to quit should expire at the end of the current year.¹ To illustrate the rule let us cite a few English cases, thus: Under a letting from year to year which is dated Dec. 20th, 1872, but specifying no date for the commencement of the term, a notice to quit given by the landlord on the 24th of June, 1874, was held a good notice of six months.² So, a notice on Sept. 28th, to quit on the ensuing March 25th, is a sufficient half year's notice.³ Likewise a notice given on Sept. 26th to quit at the end of six calendar months will determine a holding commencing on March 25th, and this is true if the word "calendar" had been omitted or the notice had expressly said half a year.⁴ A notice to quit to terminate a tenancy for a term of years, given on Dec. 24th to quit on June 24th next was good.⁵

§ 123. **The necessity for personal service of a notice to quit.** The notice to quit ought to be personally served upon the tenant usually at some place upon the property,⁶ and must be served upon all lessees or on all lessors who have the title to the term or to the reversion who hold as tenants in common.⁷ Though the notice to quit ought if possible to be personally served upon the tenant upon the premises it is likely that a service by leaving it upon the premises while the tenant is absent therefrom with some person of mature age, under such conditions that the tenant would be likely to receive it upon his return, would be sufficient in a case where the tenant attempts to avoid service by absenting himself from the premises.⁸ A statute which requires the service of a written notice to quit to terminate a tenancy from month to month requires the personal service of the written

J. Q. B. 200, [1895] 1 Q. B. 378, 14 R. 135, 72 L. T. 62, 43 W. R. 228.

¹ Bridges v. Potts, 17 C. B. N. S. 314; Soames v. Nicholson, 71 Law J. K. B. 24 [1902] 1 K. B. 157, 85 Law T. 614, 50 Wkly. Rep. 169.

² Sandill v. Franklin, 44 L. J. C. P. 216, L. R. 10 C. P. 377, 32 L. T. 309, 23 W. R. 473

³ Durant v. Doe, 6 Bing. 574, 4 M. & P. 391, 8 L. J. (O. S.) C. P. 227, 31 R. R. 499; Harrap v. Green, 4 Esp. 198.

⁴ Howard v. Wemsley, 6 Esp. 53, 9 R. R. 806.

⁵ Buddle v. Lines, 11 Q. B. 402, 17 L. J. Q. B. 108, 12 Jur. 80.

⁶ De Giverville v. Stolle, 9 Mo. App. 185; Van Studdiford v. Kohn, 46 Mo. App. 436.

⁷ Bless v. Jenkins, 129 Mo. 647, 31 S. W. Rep. 938.

⁸ The statute must always be consulted as to the method of serving the notice to quit.

notice at least in all cases where such service can conveniently be made.⁹ Hence under such a statute the mere reading of the notice to quit to the tenant is not sufficient as the statute requires personal service, and the personal delivery of the notice to the tenant. On the other hand a notice to quit sent by mail and which is actually received by the tenant within the required time is sufficient, though this mode of service is not expressly authorized. The tenant accepts all risks in receiving the notice.¹⁰ In the absence of express statutory regulation, a notice to quit necessary to terminate a tenancy from year to year may be served upon the wife of the tenant, she being in possession in case where it is impossible to serve the tenant in person.¹¹ *Ex necessitate rei* where the tenant is a corporation a notice to quit given by the landlord may be served on one of its officers.¹² If a notice to quit is served by mail it seems that the day on which it is delivered by mail to the tenant will be considered as the date from which the notice to quit is to run.¹³

⁹ Van Studdiford v. Kohn, 46 Mo. App. 436; construing Rev. St. 1889, § 637. See, also, Langan v. Schlieff, 55 Mo. App. 213.

^{9a} Langan v. Schlieff, 55 Mo. App. 213.

¹⁰ Alworth v. Gordon, 81 Minn. 445, 84 N. W. Rep. 454; Candler v. Mitchell, 119 Mich. 564, 78 N. W. Rep. 551. A notice to quit put under the door of the tenants house will be valid as a common law notice if it can be proved to have come into the tenant's hands half a year before the expiration of the current year. Alfred v. Vickery, Car. & M. 280.

¹¹ Beiler v. Devoll, 40 Mo. App. 251; Earl Orchard Co. v. Fava (Cal.) 70 Pac. Rep. 1073. Bell v. Rinker, 30 Ill. App. 300; Cadwalader v. Loerke, 10 Tex. Civ. App. 1, 29 S. W. Rep. 666, 917. See, also, Jones v. Marsh, 4 T. R. 464. The service of a notice to quit is not sufficient where, in case of a tenancy from month to month, it

is served upon the tenant who is a storekeeper by delivering it to a salesman, of the tenant who, owing to the temporary absence of his employer, was in possession of the store and who was accustomed to receive papers for his employer delivered in his absence and to put such papers in a box provided for that purpose. Such person is not an agent of the tenant for the purpose of accepting service of such a notice within the meaning of Rev. St. 1889, 6371 and it not appearing that the said notice ever reached the principal the service was manifestly insufficient. Van Studdiford v. Kohn, 46 Mo. App. 436.

¹² Doe v. Woodman, 8 East, 228.

¹³ See Reg. v. Slawstone, 18 Q. B. 388. It is not necessary that the notice to quit should be directed to the tenant if it can be proved to have been delivered to him at the proper time. Doe v. Wrightman, 4 Esp. 5. It may

§ 124. **A notice to quit given by an agent.** Speaking generally a notice to quit signed by an agent of either party to a lease is good if at the time of the agent's signing it he had authority to do so. The agent's authority may be inferred from his previous course of acting in reference to the landlord and to the premises. An agent to collect rents has presumptively no authority to sign or serve a notice to quit. In order that a notice given by an agent be sufficient, he must have had authority at the time it was given, and it is not made good by its adoption by the principal after the proper time for giving it.¹⁴ Where a notice to quit was given by an agent in the names of A and B and also several other parties, unnamed it was held valid only as to A and B.¹⁵ As a general rule an agent with power to let premises as well as to receive the rents can determine the tenancy by a notice to quit.¹⁶ But a notice to quit given by an agent of the landlord whose only authority is to receive rents is not sufficient without a ratification by the landlord.¹⁷ A receiver with a general authority to let lands to tenants from year to year has also authority to determine such tenancies by a regular notice to quit.¹⁸ In the absence of a statutory requirement to that effect the authority of an agent to sign or serve a written notice to quit need not be in writing.¹⁹

either be served personally upon him or upon his attorney or it may be left with his wife or his servant at his dwelling house or at the demised premises, *Jones v. Marsh*, 4 T. R. 464, but in all such cases a statement of the character of the notice should be made to the person with whom it is left. See *Doe v. Lucas*, 5 Esp. 155, *Smith v. Clark*, 9 Dowl. 202.

¹⁴ *Lyster v. Goldwin*, 1 G. & D. 463, 2 Q. B. 143, 10 L. J. Q. B. 275; *Mann v. Watters*, 10 B. & C. 626, 5 M. & Ry. 357, 8 L. J. (O. S.) K. B. 297.

¹⁵ *Bailey v. Foster*, 3 C. B. 215, 15 L. J. C. P. 263.

¹⁶ *Manvers v. Mizem*, 2 M. & Rob. 56.

¹⁷ *Rhodes v. Robinson*, 3 Bing.

(N. C.) 677, 4 Scott, 396; 3 Hodges, 84; 6 C. L. C. P. 235, 1 Jur. 356. See also, *Pearse v. Boulton*, 2 F. & F. 133; *Hasler v. Lemoyne*, 5 Com. Bench. (N. S.) 550.

¹⁸ *Marsack v. Read*, 12 East, 57. As to the form of the signature the name of the principal by A., his agent, is preferable. But the signing "H., agent for" the landlord to a notice to quit is as effectual as though the notice were signed with the landlord's name by "H., agent." *Earl Orchard Co. v. Fava*, 138 Cal. 76, 70 Pac. Rep. 1073. A notice given by an agent should be given and signed in the name of his principal according to the English cases. *Buron v. Denman*, 2 Exch. 188.

¹⁹ No written authority is neces-

§ 125. **Waiver of defects in the notice to quit.** The service of a written notice to quit is waived by the acceptance of an oral notice.²⁰ In general it may be said that all defects either in the substance or the form of a notice to quit or in the manner or time of its service are waived by delay in objecting if the party serving it has been induced to act relying upon the assumed validity of the notice and its service.¹² Thus all objections to a notice to quit which has been served by the tenant is waived by the lessor resuming possession of the premises with the consent of the tenant.²² A compliance with the notice to quit by the tenant waives all irregularities and informalities in it. So the action of the tenant in notifying his landlord, after he has received from him a notice to quit that he intends to move estops him from claiming subsequently that the notice to quit was insufficient.²³ A refusal to quit also constitutes a waiver by the tenant. The refusal of a tenant to quit on the ground that he is a tenant from year to year, waives any formal insufficiency of a notice to terminate a tenancy from month to month.²⁴

§ 126. **Waiver of a notice to quit by a subsequent notice.** A notice to quit which has been properly and timely served may be waived by the party who served it subsequently serving another notice the terms of which are inconsistent with the carrying out of the former notice to quit by the person upon whom it was served. Thus the service of a notice to the effect that in default of the payment of rent upon a certain day the lease will be considered as terminated is an acknowledgment of the existence of the lease when the notice was served and waives the effect of a

sary under Cal. Civ. Code, § 2309, when there is notice to quit, purporting to be signed for the landlord by his attorney, if the attorney has in fact authority to sign it. *Felton v. Millard*, 81 Cal. 540, 21 Pac. Rep. 533.

²⁰ *Smith v. Snyder*, 168 Pa. St. 514, 543, 32 Atl. Rep. 64, 36 W. N. C. 425; *Montgomery v. Willis*, 45 Neb. 434, 438, 63 N. W. Rep. 794.

²¹ *Ludington v. Garlock*, 55 Hun,

612, 9 N. Y. Supp. 24, 27; *Shirley v. Newman*, 1 Esp. 266.

²² *Williams v. Jones*, 1 Bush. (Ky.) 621; *Graham v. Anderson*, 3 Har. (Del.) 364; *Elgutter v. Drischaus*, 44 Neb. 378, 63 N. W. Rep. 19.

²³ *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. Rep. 771, 773.

²⁴ *Drey v. Doyle*, 28 Mo. App. 249

prior notice to terminate the lease.²⁵ So if the landlord of a tenancy at will after the expiration of the time limited in a notice to quit serves a second notice to quit he waives his right to proceed under the first notice.²⁶

§ 127. **The effect of a notice to quit.** The effect of the service of a notice to quit is absolutely to put an end to the relation of landlord and tenant between the parties as of the date mentioned in the notice. The former tenant is thereafter under no obligations to pay rent as such nor is he liable to the former landlord for any breach of covenant occurring after the service of the notice to quit. He is still bound however for rent which may have accrued before the date which is named in the notice for the termination of the tenancy. When the period of the notice has expired the landlord is at once entitled to possession and the tenant is thereafter a trespasser; or, at the most a tenant by sufferance unless, while he holds over, the landlord creates a new tenancy by receiving rent or other similar acts constituting a waiver of the notice to quit. But the service of a notice to quit by the landlord does not make the holding of the tenant adverse to the title of the landlord. It will not permit the tenant thereafter to deny the title of the landlord nor will it set running the statute of limitations in favor of the tenant and against the landlord or in favor of any other person. The tenant is still a tenant. Prior to the notice to quit he is a tenant under the lease. Subsequent to the notice, provided it is effective to terminate the tenancy if he remains in possession he is a tenant holding over and may therefore be a trespasser or a tenant at will or for a new term, according to the circumstances and the conduct of the landlord towards him.²⁷ If after the termination of this period of notice mentioned in the notice to quit the tenant holds over and the landlord receives rent from him the tenant is a tenant from year to year on the terms of the former lease. If the landlord does not receive rent from him he may eject him as a trespasser.

²⁵ *Dockrill v. Schenk*, 37 Ill. App. 44.

954, 83 Hun, 298. See *Doe v. Palmer*, 16 East, 36.

²⁶ *Morgan v. Powers* 31 N. Y. S.

²⁷ *Sittel v. Wright*, 122 Fed. Rep. 434, 436, 58 C. C. A. 416.

§ 128. **The withdrawal of the notice to quit.** Either party to the lease, having served a notice to quit, may subsequently withdraw it orally or in writing by appropriate language. The withdrawal by the party who has served the notice must be consented to by the other or it will be ineffectual to restore the parties to their original position. For if the party on whom the notice has been served has acted upon it either by securing a new tenant, if he be the landlord, or by hiring new premises if he be the tenant, he may refuse to accept the withdrawal of the notice and the other party is estopped to compel him to continue the relationship of landlord and tenant. So the party who has been served with a notice to quit has an absolute right without giving a reason to refuse to assent to its withdrawal. Where a lessee has received from his lessor the notice to quit which is required to be given by the lease and later on the lessee going to the landlord he is told he may stay, which he does, the notice to quit is altogether withdrawn and both parties are then remitted to the terms of the original lease, the covenants of which, being mutual, are a good and sufficient consideration for the new arrangement under which the tenant continues in possession.²⁸

§ 129. **The waiver of a notice to quit by the receipt of rent.** The duty to give notice of an intention to quit is reciprocal and consequently is a right which may be waived by either party to the lease who is entitled thereto. The waiver of a notice to quit after it has been given, is always in part at least a question of intent.²⁹ A lessor may nullify the effect of a notice to quit served by him by his subsequent actions or language. Thus the effect of a notice to quit is waived by the landlord consenting that the lessee may continue in possession after the service of the notice to quit upon him.³⁰ So, also it is unquestionably true, that the demand and acceptance of rent, as such by the landlord which becomes due after the service of the notice to quit and its payment by the tenant constitute a waiver of the notice to quit.³¹ The receipt of the rent by the landlord raises an implication of an intention on his part that the tenant shall continue

²⁸ *Supplee v. Timothy*, 124 Pa. St. 375, 384, 16 Atl. Rep. 864, 23 W. N. C. 386.

²⁹ *Lucas v. Brooks*, 85 U. S. 436, 21 L. Ed. 779.

³⁰ *Arcade Inv. Co. v. Gieriet* (Minn. 1906), 109 N. W. Rep. 250.

³¹ *Collins v. Cauty*, 6 Cush. (Mass.) 415; *Norris v. Morrill*, 43 N. H. 213; *Stedman v. McIntosh*,

in possession which intention is inconsistent with the effect of a notice to quit. The same result follows when the landlord distrains for the rent after the expiration of the time mentioned in the notice to quit.³² But the money must have been received by the landlord as rent. Hence where, after the service of a notice to quit, a tenant holds over and the landlord brings an action of ejectment, and, pending this action, the tenant surrenders possession the action of the landlord in suing for and recovering a judgment against the tenant for the value of the use and occupation of the property for the time the tenant has held over is not a waiver of the notice to quit as the money is not paid as a rent but for another purpose.³³ The landlord may, however, accept from the tenant after the service of a notice to quit the payment of rent which had accrued and was due and payable before the service of the notice without losing the benefit of the notice.³⁴ The service of a notice to quit after the expiration of the time named in a prior notice is not a waiver of the effect of the prior notice in a case where a suit had been begun after the service of the latter notice and its prosecution was continued thereafter.³⁵ It has also been held that mere acceptance of money though called by the tenant rent after a notice to quit has been given is not of itself a waiver on the part of the landlord of the notice but is merely a circumstance, to be taken with the other circumstances of the case from which such intent may possibly be implied.³⁶ For the money must not only be received as rent but it must in fact be rent and calling it rent by either party to the lease is not conclusive.³⁷ Thus, the presumption of a waiver which arises from the receipt of rent by the landlord after the

27 N. C. 571, 573; *Charter v. Cordwenter*, 6 T. R. 219, 220, 3 R. R. 161; *Keith v. Nat. Teleph. Co.*, 63 L. J. Ch. 373 [1894] 2 Ch. 147, 8 R. 776, 70 L. T. 276, 42 R. 380, 58 J. P. 573; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616.

³² *Ward v. Willingale*, 1 H. Bl. 311, 2 R. R. 770. See, also, *Jenner v. Clegg*, 1 M. & Rob. 213, and *Blight v. Dennet*, 13 Com. Bench, 178 as to effect of a demand for rent.

³³ *Stedman v. McIntosh*, 27 N. C. 571, 573.

³⁴ *Norris v. Morrill*, 43 N. H. 213.

³⁵ *Ewing v. O'Malley* (Mo. App. 1904), 82 S. W. Rep. 1087.

³⁶ *Cheany v. Batten*, Cowp. 243, 9 East. 314*n*, 9 R. R. 570*n*; *Fryett v. Jeffreys*, 1 Esp. 393; *Fitzpatrick v. Childs*, 2 Brews. (Pa.) 369.

³⁷ In the recent case of *Western Union Telegraph v. Pennsylvania R. R. Co.*, 120 Fed. Rep. 362, the rule was stated to be that the

service of the notice to quit may be entirely overcome by proof that the rent was received by an agent without authority to receive it, who received it in ignorance of the steps taken by his principal to determine the tenancy.³⁸

§ 120. When a notice to quit may be dispensed with by a surrender. Where from all the circumstances of the case or from the conduct of the parties to a lease from year to year it is clearly evident that they intended to terminate any particular yearly term without a notice to quit, the notice to quit will be wholly dispensed with.³⁹ Where the rule requiring a notice to quit in order to terminate a tenancy from year to year exists a tenant cannot dispense with the necessity for giving such notice by vacating the premises during the term or while the tenancy exists, and he will be liable for the use and occupation of such premises until the relation of landlord and tenant has been legally terminated by giving the notice required by the statute.⁴⁰ But in some of the states where a tenancy from year to year arises from a holding over it has been held that the tenant may quit at the end of the specified term without giving any previous notice to quit.⁴¹ An actual surrender by the tenant with an ac-

acceptance of rent accruing after a notice to quit had been given by the landlord was not necessarily an absolute waiver of the notice. Such an act by the landlord may be proved but is only one fact to be considered in connection with all the evidence as showing an intention on the part of the landlord. And a notice to quit once given cannot be withdrawn without the consent of both parties. If this be done it practically amounts to a new hiring.

³⁸ *Ash v. Calvert*, 2 Campb. 387. After notice to quit coupled with a notice of a raise of rent the landlord accepted checks mailed by the tenant accompanied by letters which expressly stated that the checks were for the rent at the rate which had been recognized before the raise. The checks were

not only received but retained and collected. It was held that the acceptance of the checks as rent operated not only as a waiver of the notice to quit, but of the notice of the increase of the rent. *Murphy v. Little*, 69 Vt. 261, 37 Atl. Rep. 968.

³⁹ *Critchfield v. Remaley*, 21 Neb. 178, 31 N. W. Rep. 687. Citing *Brown v. Kayser*, 60 Wis. 1, 18 N. W. Rep. 523.

⁴⁰ *Huntington v. Parkhurst*, 87 Mich. 38; *Buck v. Lewis*, 46 Mo. App. 227; *Hall v. Wadsworth*, 28 Vt. 210; *Mollett v. Brayne*, 2 Campb. N. P. 103. See also *Huddleston v. Johnston*, McClel. & Y. 140.

⁴¹ *Rorbach v. Crossett*, 46 N. Y. St. Rep. 426, 64 Hun. 637, 19 N. Y. Supp. 450; *Cook v. Neilson*, 10 Pa. St. 41; *Brightly N. P.* 463.

ceptance by the landlord at or before the end of any rental period dispenses with the necessity for a notice to quit. And the surrender need not be express for an implied surrender arising from the granting of a new lease or the substitution of a new tenant will be sufficient.⁴² Thus a parol agreement between a landlord and a tenant from year to year, that another tenant shall be substituted in the place of the tenant as soon as such substitution actually takes place, is a surrender which is sufficient under the statute of frauds and no notice to quit is necessary.⁴³ And so where a tenant quitted in the middle of his term, apartments which he had hired for a year, and the landlord let them to another tenant, the former tenant was not liable for the rent for a subsequent portion of the year during which the apartments had remained unoccupied.⁴⁴ An abandonment of the premises acquiesced in by the landlord dispenses with the necessity for notice by the landlord. But it is not sufficient if the third person does not take possession.⁴⁵ The acceptance by a tenant from year to year of a lease for a definite term, will terminate

⁴² In one case a notice to quit seems to have been implied from a surrender of the premises. There it was held that where a tenant from year to year left the premises in the middle of the year and tendered possession to the landlord and thereafter the tenant refused to pay rent for the remainder of the year until compelled to do so by suit, his liability for rent terminated at the end of the current year and no further notice on his part was necessary. *Adams v. Cohoes*, 127 N. Y. 175, 28 N. E. Rep. 25, 38 N. Y. St. Rep. 678, affirming 53 Hun, 260, 25 N. Y. St. Rep. 523, 6 N. Y. Supp. 617.

⁴³ *Stone v. Whiting*, 2 Stark. 235, 19 R. R. 710.

⁴⁴ *Walls v. Atcheson*, 3 Bing. 462, 11 Moore, 379, 2 Car. & P. 268, 4 L. J. (O. S.) C. P. 154, 28 R. R. 657.

⁴⁵ *Taylor v. Chapman, Peake Ad. C.* 19, 4 R. R. 884. *Eimermann v. Nathan*, 116 Wis. 124, 92 N. W. Rep. 550, may be cited as an illustration of the rule that a surrender may dispense with a notice to quit. The facts in that case were substantially as follows: The landlord of a tenant from year to year refused to make repairs and his tenant then told him he would give him notice in two or three days. He failed to do so but the landlord advertised the premises to let and put up a "to-let" sign upon them. This notice was up for more than thirty days before the expiration of the term at which time the tenant moved and the landlord took the keys. The court held that the landlord was estopped to assert that no notice to quit had been given.

the prior tenancy as it is a surrender and no notice to quit is required to terminate the tenancy prior to the end of the term.⁴⁶

§ 131. A disavowal of the landlord's title by the tenant may dispense with giving notice to quit by the landlord. A notice to quit need not be given by the lessor when the lessee has during the term done or said anything which amounts to a disavowal of the lessor's title.⁴⁷ It is consequently very important to determine what language or action coming from a tenant amounts to a disavowal of his landlord's title.⁴⁸ A disclaimer has been defined to be "a renunciation by the party of his character as tenant, either by setting up title in another, or by claiming title in himself."⁴⁹ Usually whether there is a disclaimer depends on the language and conduct of the tenant. The mere fact that on a demand for the payment of the rent the tenant asks whom he shall pay it to while he admitted himself to be a tenant and offered to pay the rent to the right person is not a disclaimer.⁵⁰

⁴⁶ *Roosevelt v. Hungate*, 110 Ill. 595.

⁴⁷ *Grubb v. Grubb*, 10 B. & C. 816, 8 L. J. (O. S.) K. B. 321; *Doe d. Williams v. Pasquali*, 1 Peake, 259, 3 R. R. 188; *Smith v. Ogg*, 16 Cal. 88, *Bolton v. Landers*, 27 Cal. 104; *Ramsey v. Henderson* 91 Mo. 560, 4 S. W. Rep. 408. *Amick v. Brubaker*, 101 Mo. 473, 14 S. W. Rep. 627; *Lyon v. La Master*, 103 Mo. 612, 15 S. W. Rep. 767; *Young v. Smith*, 28 Mo. 65; *Stephens v. Brown*, 56 Mo. 23; *Ramsey v. Henderson* (Mo.) 10 West. Rep. 33; *Payton v. Stath*, 5 Pet. (U. S.) 485; *Wolf v. Holton*, 92 Mich. 136, 52 N. W. Rep. 459; *Tuttle v. Reynolds*, 1 Vt. 80; *Brown v. Keller*, 32 Ill. 151; *Jackson v. French*, 3 Wend. (N. Y.) 337; *Evans v. Enloe*, 70 Wis. 345, 34 N. W. Rep. 918; *Williams v. Pasquali*, 1 Peake, 259, 3 R. R. 688; *Jefferies v. Whittick*, Gow. 195, 21 R. R. 828; *Clun v. Clarke*, Peake Ad. C. 239; *Foster v. Williams*, Cowp. 622; *Cheeser v.*

Creed, 2 M. & P. 648, *sub nom.*; *Davis v. Creed*, 5 Bing. 327, 7 L. J. (O. S.) C. P. 138; *Burgess v. Thompson*, 1 N. & P. 215, 5 A. & E. 532, 6 L. J. K. B. 57; *Landsell v. Grover*, 17 Q. B. 589, 21 L. J. Q. B. 57, 16 Jur. 100.

⁴⁸ "It is sometimes said that a tenancy from year to year is forfeited by disclaimer; but it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion that he has had no notice to quit; inasmuch as it is idle to prove such a notice where the tenant has asserted that there is no longer a tenancy." By *Patterson, J.*, in *Doe d. Graves v. Wells*, 10 Ad. & El. 427, 2 P. & D. 396. See, also, *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. Rep. 296.

⁴⁹ By *Tindal, C. J.*, in *Doe d. Williams v. Cooper*, 1 M. & G. 135, 1 Scott N. R. 36; approved in *Jones v. Mills*, 10 Com. Bench (N. S.) 788; on p. 796.

⁵⁰ *Jones v. Mills*, 10 Com. Bench

So, too, a refusal to pay rent to a devisee of the premises under a will which is being contested,⁵¹ is not a disclaimer. So where a tenant from year to year agreed to purchase the premises and thereafter he remained in possession for several years paying neither rent nor interest on the purchase money it is no disclaimer of the lessor's title for him to tell his lessor that he had bought the property and was able to procure and ready to pay the purchase money. This statement is not a disavowal of title as it is not a claim that the tenant holds the estate on any ground which is of necessity inconsistent with the continuance of a tenancy from year to year.⁵² So, where a tenant for years on a demand being made by a landlord for possession under a belief on the part of the landlord that the lease had expired refused to give up possession claiming the term had not expired, and where he said in reply to a demand for rent that he would not pay the party demanding as he did not know but that some one else might afterwards claim the rent it was held no disavowal or disclaimer of the title of the landlord.⁵³ Upon the other hand where a tenant said "I have no rent for you because A has ordered me to pay none,"⁵⁴ or where the lessee of a life tenant on the death of the latter says to his personal representative: "I will not pay rent to you; I am a tenant of another," a disclaimer and disavowal of the tenancy and of the lessor's title, dispensing with notice to quit is very clearly made out. A tenant who after his lessor has granted the reversion takes a lease from a third party by thus attorning to a stranger, repudiates the relation existing between his landlord and himself and is not entitled to a notice to quit.⁵⁵ The right of the landlord to oust the tenant without notice to quit which he acquires by the disclaimer of the tenant may be waived by the subsequent conduct of the landlord. The right of a landlord to maintain ejectment with-

(N. S.) 788, 31 L. J. C. P. 66, 8 Jur. (N. S.) 387.

⁵¹ Doe d. Grubb v. Grubb, 10 B. & C. 816.

⁵² Doe d. Gray v. Stanion, 1 M. & W. 695, 2 Gale, 154, 5 L. J. Ex. 253.

⁵³ Doe d. Williams v. Cooper, 1 Scott (N. R.) 36, 1 Man. & G. 135, 9 L. J. C. P. 229; see Doe d. Lewis

v. Cawder, 1 C. M. & R. 398, 4 Tyr. 852, 3 L. J. Ex. 239.

⁵⁴ Doe d. Whitehead v. Pittman, 2 W. & M. 672.

⁵⁵ Doe d. Calvert v. Frowd, 1 M. & P. 480, 4 Bing. 557, 560, 29 R. R. 624.

⁵⁶ Lyon v. La Master, 103 Mo. 612, 15 S. W. Rep. 767.

out serving a prior notice to quit after a disavowal may be waived by the landlord. Such a waiver would be implied where after the disclaimer or disavowal the landlord by conduct or language recognizes the existence of the relationship of landlord and tenant. By distraining for rent after a disclaimer the landlord waives the operation of the disclaimer.⁵⁷

⁵⁷ Doe d. David v. Williams, 7 Car. & P. 322. The reason that a notice to quit is regarded as unnecessary in a case where the tenant has denied the landlord's title is that by his action he has denied the existence of the relationship of landlord and tenant and is therefore estopped to assert any rights which he could have claimed as a tenant. As to whether the tenant has done or said that which amounts to a disclaimer is usually a mixed question of fact and law. If the facts or the language of the tenant are not denied by him it is for the court to determine if they constitute a disclaimer. The question then is has the tenant done

or said anything which amounts by a reasonable construction to a denial on his part that the relationship of landlord and tenant exists. If what he has said or done amounts to a setting up of a title on the part of the tenant or in some third person it is a disclaimer. The fact that the tenant did not mean to repudiate the relationship of landlord and tenant will not protect him for the effect of what he said or did. Thus a refusal to pay rent to a person legally entitled until such person proves his right is a disclaimer although the tenant does not assert a better title in himself or another. *Calvert v. Frowd*, 4 Bing, 557

CHAPTER VII.

TENANCY AT WILL.

- § 133. The definition of an estate at will.
- 134. A reservation of rent is not necessary to create a tenancy at will.
- 135. The liability of a tenant at will for rent.
- 136. Tenancy at will by express agreement.
- 137. The mere occupation of the land by the permission of the owner.
- 138. Leases of an uncertain duration.
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- 142. The vendee of the land having gone into possession under a contract to buy.
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- 152. Denial of the title of the landlord by a tenant at will.
- 153. The tenancy at will may be determined by the giving of a new lease.
- 154. The entry of the landlord on the land as terminating the tenancy.
- 155. Notice to quit when required in tenancies at will at common law.
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- 157. Statutory notice required to terminate a tenancy at will.
- 158. The termination of the period of notice.
- 159. The commission of waste by a tenant at will.
- 160. The assignability of the tenant's interest in an estate at will.
- 161. The right of a tenant at will to recover damages for an injury to the land.

§ 133. **The definition of an estate at will.** A tenancy at will may be defined to be a tenancy of land the duration of which is determinable by either party thereto. Here the lessee has no certain estate for the lessor may determine it any time he wills to do so while on the other hand the tenant is not tied down to any fixed and definite occupancy of the premises as he may, in turn, determine the tenancy at his will. In other words a tenancy at will is at the will of both parties to the tenancy.¹ This proposition however must be qualified by the statement that the tenant at will who sows the land is entitled to the emblements accordingly. Though a strict tenancy at will may be arbitrarily determined *instantly* by the landlord, yet if he do this while the tenant's crops are unreaped, he must permit the tenant to remove the crops and to have free and unrestricted ingress and egress upon the land for that purpose.²

§ 134. **A reservation of rent is not necessary to create a tenancy at will.** Inasmuch as a person who occupies land rent free may be under certain circumstances a tenant at will it is never necessary that there should be an actual reservation of rent to the landlord in order to create a tenancy at will.³ Hence a per-

¹ Knight v. Coal Co., 47 Ind. 105, 17 Am. Dec. 692. "Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor; by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain or sure estate; for the lessor may put him out at what time he pleases." Coke, Lit. ch. XXII, p. 55a; 2 Black. Com. 145; 4 Kent, 111, quoted in Morris v. Palmer, 44 S. Car. 462, 464, 22 S. E. Rep. 726; Woodfall, L. & T. 226. "An estate at will in lands is that which a tenant has, by an entry made thereon under a demise to hold under the joint wills of the parties to the same. It does not arise until actual possession taken by the lessee, and is deter-

minable at the will of either party to the demise." 1 Washburn on Real Property, 370, quoted in Bright v. McQuat, 40 Ind. 521, on page, 523. See, also, Willis v. Harrell, 118 Ga. 906, 908, 45 S. E. Rep. 794. "A tenancy at will is where the land is held by the tenant as long as lessor and lessee please that the tenancy shall continue. No notice from either party is necessary to terminate a tenancy at will, strictly so-called; any act by either party, affording to the other proper evidence of his determination that the tenancy should no longer continue, is sufficient." Digby's History of the Law of Real Property, p. 212.

² 2 Black. Com. 146.

³ Rex v. Jobling, R. & R. 525; Rex v. Collett, R & R. 498; Nicholl v. McKaeg, 10 B. & Cr. 721; Rex

son who is permitted by the owner of land to occupy the land without any agreement for the payment of rent having been made merely upon condition that he shall take care of the same is a tenant at will so long as he fulfills his agreement.⁴ And a person who is placed in the possession and occupancy of land by the owner without any contract to pay rent but with an express understanding that he will surrender possession whenever the owner shall require him to do so is a tenant at will.⁵ On the other hand the fact alone that the person who it is claimed is a tenant at will does pay rent does not overcome the fact or presumption that he is a tenant at will unless it shall appear that the rent is paid by him upon the basis of a yearly or monthly holding.⁶

§ 135. **The liability of a tenant at will for rent.** Except perhaps in the case of a tenancy at will arising from the occupation of premises by a vendee before taking title, a tenant at will is liable for rent to the landlord. In this respect a tenant at will differs from a tenant at sufferance who in the absence of statute, is not liable for rent to the owner for the reason that he is in possession by the oversight of the owner and is as to him a mere trespasser. If the owner at the common law receives rent from a tenant at sufferance he at once becomes a tenant at will or from year to year according to the length of the rental period. But the owner may recover rent or for use and occupation from a tenant at will unless he has agreed to let him occupy the premises rent free. Where the amount of the rent which the tenant at will is to pay has been fixed by the parties the landlord may distrain for it.⁷ On the other hand if no fixed sum as rent has been agreed upon the landlord is entitled to recover a fair and reasonable sum for use and occupation.⁸ Unless the tenant can

v. Fillongley, 1 T. R. 459, 8 L. J. (O. S.) K. B. 310; Rich v. Bolton, 46 Vt. 84.

⁴ Jones v. Shay, 50 Cal. 508; Herrell v. Sizeland, 81 Ill. 457; Groves v. Groves, 10 Q. B. 486.

⁵ Humphries v. Humphries, 3 Ired. (N. C.) Law, 362; Rex v. Fillongley, 1 T. R. 458.

⁶ Bastow v. Cox, 11 Q. B. 22; Anderson v. Midland Railway Co., 3 El. & El. 614, 30 L. J. Q. B. 94,

7 Jur. (N. S.) 411, 3 L. T. 809; Cox v. Bent, 5 Bing. 185, 5 M. & R. 281, 17 L. J. (O. S.) 68, 30 R. R. 566; Braythwayte v. Hitchcock, 10 M. & W. 494, 497; Doe dem. Hull v. Wood, 14 M. & W. 682.

⁷ Davies v. Thomas, 6 Exch. 858; Anderson v. Midland Railway Co., 30 L. G. B. 94.

⁸ Marwood v. Waters, 13 C. B. 820. *Contra*, Hyde v. Moakes, 5 Car. & P. 42.

show that it had been agreed that he should pay no rent, the presumption is that the tenant at will is to pay something for the use of the premises and the burden of proof is usually upon him to show that he should not. In order that a landlord may recover against a tenant at will for use and occupation, the tenant must have been in by the permission of the landlord and as his tenant. The landlord cannot recover where the tenant at will is a subtenant being the tenant of a lessee unless the landlord has accepted the subtenant as his own tenant at will.⁹

§ 136. **Tenancy at will by express agreement.** At common law all estates and terms the duration of which was indefinite and uncertain were estates at will. Such interests and estates being extremely precarious on account of the readiness with which they might arbitrarily be terminated by the landlord were of little value to the tenants who because of these facts could be greatly inconvenienced if not ruined by an arbitrary exercise of the will of the landlord. Such estates by a course of judicial legislation commenced at a very early period were gradually transformed into tenancies from year to year which were still determinable at the will of either but only on the giving of six months' notice according to the English common law.¹⁰ The courts in this process of transforming one species of tenancy into another seized upon two circumstances, i. e., the yearly harvesting of the crops by the tenant at will and the payment of a rent by the year as determining factors in the working of the transformation. But they did not wholly abolish tenancies at will, recognizing them and affirming them in all cases of holding for an indefinite term, where these factors are not discovered to be present as well as in all cases where the parties by express language or by necessary implication, may fairly be presumed to have created a tenancy at will. Though the ancient tenancies at will are now largely considered as tenancies from year to year and are terminable only upon proper notice to quit by either party there is no question that there may be still tenancies at will created whenever the parties expressly stipulate to that effect.¹¹ In Indiana by statute it is provided that a tenancy at will cannot arise or be created without an express agreement

⁹ Phipps v. Sculthorpe, 1 B. & Ald. 50, 18 R. R. 426; Hyde v. Moakes, 5 C. & P. 42.

¹⁰ 1 Washburn on Real Property, 382.

¹¹ Sullivan v. Enders, 3 Dana

and that all general tenancies in which the premises are occupied by the consent, either express or constructive of the landlord, shall be tenancies from year to year.¹² Where a notice to quit is required in the case of a tenancy from year to year a father who permits his son with his family to remain in possession of premises for several years, and, upon the son's death, tells the widow that she may remain for that year, if he allows the year to pass and another to begin can terminate her tenancy only by the notice required by statute and a mere demand for rent will not be sufficient.¹³

§ 137. **The mere occupation of the land by permission of the owner.** An occupation of land by the permission of the owner without any lease or agreement by the occupant to pay him rent, and without any rent being paid by the occupant, and also without any definite term or period of occupation agreed upon by the parties, undoubtedly creates a tenancy at will. The occupation of the land must be with the consent of the owner, which may be either express or implied, in the absence of a statute requiring the consent to be express, or the occupant will be a trespasser or at the most a tenant at sufferance of the owner. So, too, the period of occupation must be undefined and unlimited for if a definite period be agreed upon or implied from the payment periodically of rent, it is either a tenancy for years or from year to year according to the circumstances of each case.¹⁴ Thus, for example, a widow who, with the knowledge of

(Ky.) 66, citing *Squires v. Huff*, 3 A. K. Marsh. (Ky.) 18. A parol agreement to pay rent in advance does not constitute a conditional limitation of a tenancy at will so as to entitle the landlord, upon the failure of the tenant to pay rent in advance, to dispense with a statutory notice to quit, or to enter on the premises at once, or to maintain a summary proceeding to secure possession, provided by a statute. Nor can the tenant, *a fortiori* terminate a tenancy at will by failing to pay rent alone and without giving a required statutory notice to quit. *Elliott*

v. Stone, 12 Cush. (Mass.) 174; *Sprague v. Quinn*, 108 Mass. 553, 554.

¹² Rev. St. 1881, § 5208.

¹³ *Tobin v. Young* (Ind.), 17 N. E. Rep. 625.

¹⁴ *Hayden v. Collins* (Cal. App. 1906) 81 Pac. Rep. 1120; *Jones v. Shay*, 50 Cal. 308; *Perkins v. Perkins* (Conn. 1886) 5 Atl. Rep. 373; *White v. Elwell*, 48 Me. 360, 77 Am. Dec. 231; *Cheever v. Pearson*, 16 Pick. (Mass.) 266; *Wilson v. Merrell*, 38 Mich. 707; *Larned v. Hudson*, 60 N. Y. 102; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 159; *Earsfield v. Healy*, 50 Barb.

the lessor after the death of her husband remains in possession of the premises which her deceased husband had occupied under a lease by the year,¹⁵ a divorced wife who, with her husband's consent, occupies land which is owned by him,¹⁶ or a person who, with the owner's consent, erects buildings on land and occupies them with his consent without paying rent to the owner,¹⁷ is a tenant at will. So, where a parish voted that certain persons should have the privilege to erect a seminary on public and unoccupied land owned by the parish with liberty to remove the building at their pleasure and that the same persons have certain land to be used in connection therewith for seminary purposes, the parties who are thus privileged become tenants at will of the parish.¹⁸ But, a tenancy at will is never created where the occupation is without the consent of the owner. So, one who occupies land without the owner's consent and during his occupation agrees to pay the owner rent for the time he has occupied it on condition that, if he paid the rent, he might continue in the occupation does not thereby become a tenant at will or lose his condition as a trespasser until he shall actually pay the rent.¹⁹

§ 138. **Leases of an uncertain duration.** A lease in writing or by parol and reserving rent in general and providing for its payment but not specifying any period during which the term is to continue creates only a tenancy at will. If the parties to a lease do not name or fix the duration of the term or do not designate its duration so that its length remains indefinite and uncertain, there is a presumption that the lease is meant to create a tenancy at will.²⁰ A written lease in which the dura-

(N. Y.) 255; *Humphries v. Humphries*, 25 N. C. 362; *Johnson v. Johnson*, 13 R. I. 467; *Rex v. Collett*, R. & R. 498; *Rex v. Jobling*, R. & R. 525; *Rex v. Fillongley*, 1 Term Rep. 458; *Doe d. Hull v. Wood*, 14 Mee. & Wel. 682, 687, 15 L. J. Exch. 41; 9 Jur. 1060; *Richardson v. Langridge*, 4 Taunt. 128 (holding that a mere general letting is a tenancy at will). See, also, *Morris v. Palmer*, 44 S. Car. 462, 464, 22 S. E. Rep. 726.

¹⁵ *Perkins v. Perkins* (Conn. 1886) 5 Atl. Rep. 373.

¹⁶ *Wilson v. Merrill*, 38 Mich. 707.

¹⁷ *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Couch v. Burke*, 2 Hill (S. Car.) 534.

¹⁸ *Cheever v. Pearson*, 16 Pick. (Mass.) 266.

¹⁹ *Center Creek Min. Co. v. Frankenstein*, 179 Mo. 564, 78 S. W. Rep. 785.

²⁰ *St. Louis, etc., R. Co. v. Hall*,

tion of the term is not stated expressly or by implication creates a strict tenancy at will.²¹ So, a lease for a period of time commencing on a certain date stated and to continue until the lessor is prepared to improve the grounds with new buildings,²² or a lease for as long as the parties please to continue it,²³ or a lease giving a right to occupy land for a stated consideration so long as the occupant pleases to occupy,²⁴ or a lease for such a time as may be agreeable to us both,²⁵ or a letting from month to month with an express understanding in the lease that the tenant should vacate the premises whenever the landlord desired possession of them,²⁶ or a lease expressly for a term of years but which is to determine without notice whenever the premises are sold,²⁷ or permission to occupy a house at a fixed rent until the wife of the occupant recovers from an illness,²⁸ creates a tenancy at will.²⁹ An agreement by the parties that a tenant

71 Ark. 302, 74 S. W. Rep. 293; Jones v. Shay, 50 Cal. 508; Herrell v. Sizeland, 81 Ill. 457; Pidgeon v. Richards, 4 Ind. 374; Fischer v. Johuson, 106 Iowa, 181, 76 N. W. Rep. 658; Martin v. Knapp, 57 Iowa, 342, 10 N. W. Rep. 721; Mattox v. Helm, 5 Litt. (Ky.) 186, 15 Am. Dec. 64; Goodenow v. Allen, 68 Me. 308, 311; Gardner v. Hazleton, 121 Mass. 494; Haines v. Beach, 90 Mich. 563, 51 N. W. Rep. 644; Sanford v. Johnson, 24 Minn. 172; Den v. Drake, 14 N. J. Law, 523; Larned v. Hudson, 60 N. Y. 102; Jackson v. Bradt, 2 Caines (N. Y.) 169; Post v. Post, 14 Barb. (N. Y.) 253; Burns v. Bryant, 31 N. Y. 453; Woodrow v. Michael, 13 Mich. 187; Amick v. Brubaker, 101 Mo. 473, 14 S. W. Rep. 627; Corby v. MacSpadden, 63 Mo. App. 648, 2 Mo. App. Rep. 950; Sanford v. Johnson, 24 Minn. 72; Lee v. Hernandez, 10 Tex. 137, 138; Harrison v. Middleton, 11 Grat. (Va.) 527; Richardson v. Langridge, 4 Taunt. 128, 13 R. R. 570; Rae v. Lewis, 2 W. Bl. 1173; Com. Dig. tit. Estates, H, 1. "All

leases for uncertain terms are *prima facie* leases at will; it is the reservation of an annual rent that turns them into leases from year to year." Roe v. Lees, 2 W. Bl. 1173.

²¹ Amick v. Brubaker, 101 Mo. 473, 14 S. W. Rep. 627.

²² Corby v. MacSpadden, 2 Mo. App. Rep. 950, 63 Mo. App. 648.

²³ Richardson v. Langridge, 4 T. R. 128; Bartow v. Cox, 11 Q. B. 122.

²⁴ Pidgeon v. Richards, 4 Ind. 374.

²⁵ Murray v. Cherrington, 99 Mass. 229.

²⁶ Woodrow v. Michael, 13 Mich. 187.

²⁷ Pfanner v. Sturmer, 40 How. Pr. (N. Y.) 401; Lee v. Hernandez, 10 Tex. 137.

²⁸ Doyle v. Gibbs, 6 Lans. (N. Y.) 180.

²⁹ A parol lease of premises to endure only until the owner shall sell them is a valid lease at will though by its terms the rent was to be paid every two months. Hence upon the sale being made

may occupy premises as a school so long as he "kept a good school," is a tenancy at will. And the requirement that the occupant shall keep a good school constitutes a conditional limitation, the breach of which terminates the estate of the tenant without entry by the landlord. Evidence that the tenant was an incompetent teacher is admissible to show that he no longer keeps a good school.³⁰

§ 139. **Entry under an agreement for a lease.** Where parties have made an agreement to execute a lease in the future, and pending this agreement, the prospective tenant enters upon and occupies the premises with the landlord's consent, he becomes at once a tenant at will of the future landlord and continues so until the execution of the lease which has been agreed on which is the principal contract and into which the tenancy at will is then merged. But if during the tenancy at will, rent is paid by the year, the party who has entered under the agreement is a tenant thereafter from year to year which tenancy is also terminable by the execution of the future lease.³¹ The payment

the lease terminates at once without notice to the tenant. *Clark v. Rhoads*, 79 Ind. 342. "Leases for uncertain times, are, *prima facie*, leases at will; it is the reservation of annual rent that turns them into leases from year to year." *Roe ex. d. v. Lees*, 2 W. Bl. 1173. An entry by the tenant under an oral lease for the term of fifteen years was held to be a tenancy at will where the premises upon which the tenant entered consisted of a house which the landlord erected for the tenant upon the land of a third person with an agreement on the part of the landlord that he would remove it whenever he was directed to do so. It follows therefore that a notice to quit is required. *Blackwell v. Bowers*, 67 Vt. 403, 31 Atl. Rep. 848; following *Stafford v. Adair*, 57 Vt. 63.

³⁰ *Ashley v. Warner*, 11 Gray (Mass.) 43.

³¹ *Carteri v. Roberts*, 140 Cal. 164, 73 Pac. Rep. 818; *Carbett v. Cochrane*, 67 Conn. 570, 35 Atl. Rep. 509; *Lockwood v. Lockwood*, 22 Conn. 425, 433; *Weed v. Lindsay*, 88 Ga. 686, 694; *Dunne v. Trustees*, 39 Ill. 578, 582; *Emmons v. Scudder*, 115 Mass. 367; *Swart v. Western Union Telegraph Co.*, 12 Detroit Leg. N. 609, 105 N. W. Rep. 74; *Childers v. Lee*, 5 N. Mex. 576, 25 Pac. Rep. 781; *Hamerton v. Sncad*, 3 Bar. & Cr. 483, 10 E. C. L. 159; *Chapman v. Towner*, 6 Me. & Wel. 100; *Anderson v. Midland Ry. Co.* 3 E. & E. 614; *Pollen v. Brewer*, 7 Com. Bench (N. S.) 371; *Clayton v. Blakey*, 2 Smith Lead. Cas. 116, note; *Hegan v. Johnson*, 2 Taunt. 148, 149; *Gray v. Stanion*, 1 Me. & Wel. 695; *Cox v. Bent*, 5 Bing. 185; 2 M. & P. 281; *Lamar v. Dixon*, L. R. 6 H. L. 514; *Knight v. Benett*, 11 Moore, 222, 3 Bing. 361, 4 L. J. (O. S.) C. P. 94, 28 R. R. 640; *Doe d.*

of rent by the tenant at will must be in reference to a yearly holding in order to convert such a tenancy at will into a yearly tenancy or a tenancy from year to year for if the party who has entered on the premises under an agreement for a lease pays rent not with reference to a year or any aliquot part of a year but merely pays rent generally, he is still a tenant at will.³² One payment of yearly rent is sufficient. But the presumption that a tenancy at will has been transformed into a tenancy from year to year by one payment of a yearly rent may be strengthened by a repetition of the payments and a continuance in possession for more than a year.³³ A lessor may under particular circumstances be estopped by his conduct, as by the deliberate failure or neglect to sign a lease that the tenant has signed, to assert that such a lease creates only a tenancy at will. He cannot accept as much of the contract to make a lease as proves, or as is likely to prove, favorable to his interests, while rejecting that portion of it which is not likely to be of advantage to him. Thus, where the assignee of a lessee's interest in the term enters upon the possession of the land with the consent of the lessor who, thereupon, prepares a new lease for the unexpired term which new lease is executed by the assignee but is not executed by the lessor, the latter is estopped to claim that the new agreement which he has neglected to execute is a revocation of the lease which was assigned and he is also estopped at the same time to assert that by reason of his failure to sign the new lease, it operates only to create a tenancy at will in the assignee.³⁴ The tenant who thus enters on land under an agreement to make a lease will be held liable to the landlord for use and occupation during the period he is in possession, in the absence of an express agreement to the contrary between the parties.³⁵ Tenants who have been admitted into the possession of the premises under an agreement to exe-

West Morland v. Smith, 1 M. & Ry. 137; 6 L. J. (O. S.) 44; Doe d. Pritchard v. Dodd, 2 N. & M. 838, 5 B. & Ad. 689; Braythwaite v. Hitchcock, 10 M. & W. 494, 12 L. J. Ex. 38, 6 Jur. 976; Riseley v. Ryle, 11 M. & W. 6, 12 L. J. Ex. 38.

³² Richardson v. Langridge, 4 Taunt. 128.

³³ Braythwaite v. Hitchcock, 10 M. & W. 494, 497.

³⁴ Morris v. Palmer, 44 S. Car. 462, 469, 22 S. E. Rep. 762.

³⁵ Forbes v. Smiley, 56 Me. 174; Lyon v. Cunningham, 136 Mass. 532, 540; Greton v. Smith, 33 N. Y. 245; Rogers v. Pullen, 2 Bing. (N. C.) 749; Sloper v. Saunders, 29 L. J. (N. S.) Ex. 275; Smith

cute a lease of them for a term of years cannot, where they subsequently refuse to execute the lease offered to them in conformity with the contract for a lease, continue in the possession of the premises as tenants at will merely because the landlord had not erected upon the premises such a building with respect to plan and finish as was contemplated in the agreement. The tenants' remedy is either to execute the lease, pay the stipulated rent, occupy the premises, and compel by an appropriate equitable action the specific performance of the contract to build or to vacate the premises at once and sue for any damages they may have sustained. If they do neither they are simply tenants at will and after proper notice to quit is given to them as is required by the statute they may be summarily removed as tenants at sufferance holding over.^{35a}

§ 140. **Tenancy at will created by a defective or unexecuted lease.** Somewhat similar to the case of one who, with the owner's consent, enters upon land pending negotiations between him and the owner for a lease to be executed in the future is the case of a person who enters under a lease which purports to have been executed by both the parties but which is invalid and not binding on the landlord because he has not authorized its execution by the person who signed it as his agent. In some of the states such a lease by the statute of frauds creates an estate at will only, though it may expressly provide for the payment of a yearly rental.³⁶ So, where a lease which is signed by the lessee is not executed by the lessor, it has been held to create a tenancy at will only though the lease stipulated for the payment of a monthly rental.³⁷ And a lessee who, by taking possession under a lease which is invalid because it was not authorized by the lessor becomes a tenant at will, though he may be liable for use and occupation, cannot be sued for rent under the invalid lease.³⁸ And finally, one who having been in possession under a valid lease which has expired, continues in posses-

v. Eldridge, 15 Com. Bench, 236;
Thetford v. Tyler, 8 Q. B. 95;
Dawes v. Dowling, 22 W. R. 770.

^{35a} Weed v. Lindsay, 88 Ga. 686,
695, 15 S. E. Rep. 836, 20 L. R. A.
33.

³⁶ Lehman v. Nolting, 56 Mo.

App. 549; see, also, Hoover v. Pacific Oil Company, 41 Mo. App. 317.

³⁷ Nicholls v. Barnes, 32 Neb. 195, 49 N. W. Rep. 342.

³⁸ Jennings v. McComb, 112 Pa. St. 518, 4 Atl. Rep. 812.

sion under a void lease, is a tenant at will and not a tenant holding over under the former lease.³⁹

§ 141. **Leases void under the statute of frauds.** Where a tenant enters under an oral lease which is for more than a year and which is for that reason invalid under the statute of frauds, or in fact under any invalid lease, he is according to very many of the authorities, merely a tenant at will. In most of the states this is expressly so provided according to the language of the statutes which substantially provide that all parol leases which in duration shall exceed a certain term shall have the force and effect of leases at will only. In other words, the statute expressly determines and fixes the tenancy between the parties.⁴⁰ The

³⁹ *Carney v. Mosher*, 97 Mich. 554. The execution of a lease for years by an agent of the lessor who is without authority to do is a nullity. Nevertheless a lease made under such circumstances creates a tenancy at will as soon as the tenant enters under it. And where after his entry he pays rent by the month a monthly tenancy is created which is binding upon both the parties to the written lease, though the writing is unenforceable as a lease for a term of years. *Lehman v. Nolting*, 56 Mo. App. 549. A tenancy at will has been held to have been created under the following facts and circumstances:

A lease for twenty-one months was void for want of authority in the agent of the lessor who signed it. The lessee entered and occupied the premises for twelve months and paid rent for that period and then vacated the premises. It was held that this did not create a tenancy from year to year but that the lease being void as such was simply evidence of a tenancy at will and hence was admissible in an action for use and occupation. *McIntosh v. Hodges*

(Mich. 1897) 70 N. W. Rep. 550. See, also, as to the effect of the acceptance of a month's rent by the landlord where the tenant had for some time held under a lease which had expired and which he had refused to renew at an advanced rental. *Fall v. Moore*, 45 Minn. 515, 48 N. W. Rep. 404.

⁴⁰ *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Petty v. Kennon*, 49 Ga. 468; *Western Union Tel. Co. v. Fain*, 52 Ga. 18; *Nicholes v. Smith*, 118 Ga. 922, 925, 45 S. E. Rep. 708; *Packard v. Cleveland C. C. & St. L. Ry. Co.*, 46 Ill. App. 244; *Bailey v. Ward*, 32 La. Ann. 839; *Thomas v. Sanford, S. S. Co.*, 71 Me. 548; *Duley v. Kelly*, 74 Me. 346; *Ellis v. Parge*, 1 Pick. (Mass.) 43; *Huyser v. Chase*, 13 Mich. 98, 103; *Hingham v. Inhabitants of Sprague*, 15 Pick. (Mass.) 102; *McIntosh v. Hodges*, 110 Mich. 319, 70 N. W. R. 550; *Kelly v. Waite*, 12 Met. (Mass.) 300; *Barrett v. Cox*, 112 Mich. 220, 70 N. W. Rep. 446; *Goodwin v. Clover*, 91 Minn. 438, 98 N. W. Rep. 322; *Allen v. Mansfield*, 82 Mo. 688; *Talamo v. Spitzmiller*, 120 N. Y. 37, 23 N. E. Rep. 980, 8 L. R. A. 980, 17 Am. St.

statute fixes and determines the character of the tenure and the duration of the term but leaves the other incidents of the relationship between the parties to be determined according to their original intention as expressed by them. Inasmuch as the lease is not binding upon either party, either can at any time dissolve the relationship whatever it may be, that exists and hence necessarily the holding which is created by an entry under a void lease can be nothing else but a tenancy at will. The courts, however, will respect the original intent of the parties so far as possible. The tenant at will under the lease void under the statute of frauds, will be presumed to hold the premises subject to the terms of the void lease except as to its duration and termination. So far as such terms are applicable, they will be applied.⁴¹ One of the ever-present and most striking characteristics of an estate at will is its easy convertibility into a tenancy from year to year by the payment and acceptance of a yearly rent. Hence, though a parol lease which is invalid under the statute creates in the first instance only a tenancy at will, this tenancy, like any other tenancy at will, may be turned into a tenancy from year to year without any violence to or any evasion of the express language of the statute of frauds. This conversion may result from the payment of the rent by the year or from other circumstances showing an intention on the part of the parties to create a tenancy from year to year. Such an implication from the payment of rent is not in contravention of the statute which recognizes as valid, leases from year to year which have been created by parol.⁴² A mere entry and remaining in

Rep. 607; *Stover v. Cadwallader*, 2 Penny, 124; *McDowell v. Simpson*, 3 Watts (Pa.) 135; *Clark v. Smith*, 25 Pa. St. 137; *Phillips v. Fearnside*, 4 Hayw. (Tenn.) 158; *Duke v. Harper*, 6 Yerg. (Tenn.) 280, 284, 27 Am. Dec. 462; *Blanchard v. Bowers*, 67 Vt. 403, 31 Atl. Rep. 848; *Denn d. Warren v. Fearnside*, 1 Wils. 176; *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680.

⁴¹ *Lockwood v. Lockwood*, 22 Conn. 425; *Strong v. Crosby*, 21 Conn. 498; *Taggard v. Roosevelt*,

2 E. D. Smith (N. Y.) 100; *Schuyler v. Leggatt*, 2 Cow. (N. Y.) 660; *Tress v. Savage*, 4 E. & E. 36, 2 C. R. L. 1315, 23 L. J. Q. B. 339; 18 Jur. 680, 2 W. R. 564; *Richardson v. Gifford*, 1 Ad. & El. 52, 3 N. & M. 325, 3 L. J. Q. B. 122; *Arden v. Sullivan*, 14 Q. B. 832, 14 Jur. 712, 19 L. J. Q. B. 268; *Beale v. Sanders*, 3 Bing. (N. C.) 850, 5 Scott, 58, 3 Hodges, 147, 6 L. J. C. P. 283, 1 Jur. 1083; *Goodwin v. Clover*, 91 Minn. 438, 98 N. W. Rep. 322.

⁴² *McDowell v. Simpson*, 3

possession under a void lease for a period short of a year, without payment of rent are not enough to convert the estate at will into an estate from year to year nor do these create a tenancy for a year under the statute of frauds. Something more than this is always necessary. There need be no new contract of lease in express terms in order to convert the tenancy at will into a tenancy from year to year. But there must be something from which an intention to create a tenancy from year to year may reasonably be inferred and this is so commonly an occupation from year to year with the payment of rent for a year or for an aliquot part thereof that the presumption therefrom is usually conclusive in the absence of explanatory evidence to the contrary.⁴³ An occupation for at least one year with payment of rent at so much per year will usually be sufficient. Where it is claimed that a tenancy at will has been created by a parol agreement invalid under the statute of frauds, it is always necessary to show an entry upon the premises by the tenant. And such a tenancy if proved by parol, begins only with the date of the entry into possession of the tenant.⁴⁴

§ 142. **Vendee of the land having gone into possession under a contract to buy.** In England and in some of the states of the Union an occupant of land holding under an executory contract for a sale and conveyance to him of the land is a *quasi* tenant at will and he cannot be evicted without a previous demand for the possession though he may not be entitled to notice to quit.⁴⁵

Watts. (Pa.) 135; *Dunn v. Rothermel*, 112 Pa. St. 272, 282. 17 W. N. C. 292, 43 L. I. 376, 3 Atl. Rep. 800; *Packard v. Cleveland C. & St. Louis R. Co.*, 46 Ill. App. 244, 245. In *Talamo v. Spitzmiller*, 120 N. Y. 37, on page 42, the court by Bradley, J., says: "The mere fact that a person goes into possession under a lease void because for a longer period than a year, does not create a yearly tenancy. If he remains in possession with the consent of the landlord for more than one year under circumstances permitting the inference of his tenancy from year to year,

the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year. And the terms of the lease void as to duration would control as to rent."

⁴³ *Talamo v. Spitzmiller*, 120 N. Y. 37, 42, 43, 23 N. E. Rep. 980, 8 L. R. A. 221, 17 Am. St. Rep. 607, citing *inter alia* *Reeder v. Sayer*, 70 N. Y. 184; *Laughran v. Smith*, 75 N. Y. 209.

⁴⁴ *Hardy v. Winter*, 38 Mo. 106; *Pollock v. Kitrell*, 4 N. C. 585.

⁴⁵ *Hall v. Wallace*, 88 Cal. 434, 26 Pac. Rep. 360; *Blum v. Robert-*

In the state of New York the contrary rule is recognized and it is held that a vendee in possession of land under a contract to convey is not a tenant of the vendor at all, and he is not, for this reason, entitled to notice to quit.⁴⁶ The entry and the holding of the premises under a parol contract made by a reputed agent

son, 24 Cal. 127. 145; Goodwin v. Perkins, 134 Cal. 564, 66 Pac. Rep. 793; Manchester v. Doddridge, 3 Ind. 360, 363; Venable v. McDonald, 4 Dana (Ky.) 336, 337; Patterson v. Stoddard, 47 Me. 355, 74 Am. Dec. 490; Towne v. Butterfield, 98 Mass. 106; Kiernan v. Linnehan, 151 Mass. 543; Gould v. Thompson, 4 Met. (Mass.) 224, 229; Howard v. Merriam, 5 Cush. (Mass.) 563; Proprietors of Township No. 6 v. McFarland, 12 Mass. 325; Lyons v. Cunningham, 136 Mass. 532, 537; Rawson v. Babcock, 40 Mich. 330; Crane v. O'Reiley, 8 Mich. 312; Dwight v. Cutler, 3 Mich. 572; Love v. Edmonston, 23 N. Car. 152; Dowd v. Gilchrist, 46 N. Car. 353; Richardson v. Thornton, 52 N. Car. 458; Kaas' Estate, 5 Pa. Co. Ct. Rep. 55; Jones v. Jones, 2 Rich. Law (S. Car.) 542; Den v. Webster, 10 Yerg. (Tenn.) 510; Winnard v. Robbins, 3 Humph. (Tenn.) 614; Carpenter v. United States, 17 Wall. (U. S.) 489; Winterbottom v. Ingham, 7 Q. B. 611; Carrigan v. Woods, 1 R. 1 C. L. 73; Tomes v. Chamberlaine, 5 Mee. & Wel. 14; Braythwaite v. Hitchcock, 10 Mee. & Wel. 494; Gray v. Stamon, 1 Mee. & Wel. 695; Megan v. Johnson, 2 Taunt. 148; Lewis v. Beard, 13 East, 210; Newby v. Jackson, 1 B. & C. 448; Roe v. Street, 2 A. & El. 329; Jones v. Jones, 10 B. & C. 718; Doe d. Stanway v. Rock, 6 Jur. 266, 2 Man. & Gr. 30; Howard v. Shaw, 8 Mee.

& Wel. 118; Doe d. Hiatt v. Miller, 5 Car. & P. 595; Doe d. Parker v. Boulton, 6 M. & S. 148.

⁴⁶ Jackson v. Miller, 7 Cow. (N. Y.) 747, 752; Jackson v. Moncrief, 5 Wend. (N. Y.) 29; Wright v. Moore, 21 Wend. (N. Y.) 233; Doolittle v. Eddy, 7 Barb. (N. Y.) 78; Jackson v. Kingsley, 17 Johns. (N. Y.) 158. See also as to the early rule in Massachusetts, Little v. Pearson, 7 Pick. (Mass.) 301; Quincy Parish v. Spear, 15 Pick. (Mass.) 144; King v. Johnson, 7 Gray (Mass.) 239. It has been much discussed whether one who is let into possession of land under contract for a deed, intended to be executed and delivered as soon as the title can be examined and the deed prepared, can, while the contract remains in force and unexecuted, be regarded as a tenant of the vendor or be held liable to pay for the use and occupation. By perhaps a majority of the courts it is considered that he is a licensee; that at law his right to occupy is determinable at any time by entry or demand for possession; that if he accepts the deed, he is liable for nothing except under his contract for the purchase; that, if he refuses the deed, he may then be held liable to pay for the intervening occupation either in an action of trespass, after entry, or ejectment, or perhaps in assumpsit; that, if the owner refuses to give a deed according to the contract, the vendee

of the vendor and owner who had no authority to make it and which for that and other reasons is invalid, have the same effect in creating a tenancy at will in the occupant as would an entry under a valid contract which was binding on the owner.³⁷ All the rules of law which are applicable to an estate at will in general are usually admitted to be applicable to a tenancy at will which is created by a purchaser entering upon the premises which he has agreed to purchase. His estate or tenancy may be determined by a simple demand of possession, by a sale of the premises to another or by the death of the vendee. So, if he disavows the vendor's title or attorns to another person, his tenancy is at an end.⁴⁸ But though his tenancy is at an end, his rights as a vendee continue unimpaired and in full vigor. So, also, it should be noted, however, that it is the entry into the possession of the vendee rather than his agreement to purchase which creates the tenancy at will. Any person who thus enters with the consent of the landlord cannot be a trespasser. He must be a tenant of some sort. The character of the tenancy

may immediately abandon the possession, and the owner cannot maintain an action of any kind on account of the intervening occupation. There may be special circumstances attending the transaction from which an agreement to pay for the intervening occupation may be inferred or implied, but it is not by these courts inferred or implied from the sole fact of a permissive occupation pending the preparation and delivery of the deed."—By Field, J., in *Lyon v. Cunningham*, 136 Mass. 532, on page 537.

A person who contracts for the purchase of land and is let into possession by the vendor is not liable on the vendor failing to make a good title for the value of use and occupation in respect to the time he has held it. *Winterbottom v. Ingham*, 7 Q. B. 611, 14 L. J. Q. B. 298, 10 Jur. 4.

⁴⁷ *Hall v. Wallace*, 88 Cal. 434,

436, 26 Pac. Rep. 360; *Patterson v. Stoddard*, 47 Me. 355, 74 Am. Dec. 490. *Contra Smith v. Singleton*, 71 Ga. 68, 70; see, also, *Godfrey v. Walker*, 42 Ga. 562, 573. In *Smith v. Singleton*, 71 Ga. 68, on page 70, the court after pointing out that the agent had no authority to sell and that he claimed none and also calling attention to the fact that the principal never ratified the act of the agent though it came to his knowledge says: "The transaction amounted to nothing more than an offer to purchase, which was never accepted. There was no contract of sale" which could have been enforced. Such a case is clearly distinguishable from one in which the vendee is in possession under a completed contract of sale and had a bond for title on payment of the purchase money."

⁴⁸ *Love v. Edmondston*, 23 N. Car. 152, 154.

which is created when the vendee is already in possession as a tenant from year to year, when he enters into the contract to purchase, depends upon the circumstances of each case. The presumption is that he continues to occupy as a tenant from year to year, but this presumption is rebuttable by the circumstances. The buildings and improvements which are on the land when it is sold continue the property of the vendor and at his risk until a deed is tendered to the vendee though the vendee goes into possession. If during the occupancy of the vendee as a tenant, the buildings are destroyed by fire, he is under no obligation to take a deed of the premises where the continued existence of the buildings was the substantial motive which prompted the purchase by him and their occupancy was the purpose with which he entered. Hence the tenancy at will is terminated by the fire destroying the buildings and the vendee's refusal to take a deed when tendered thereafter by the owner.⁴⁹ In those jurisdictions where a vendee who goes into possession prior to his taking title is regarded as a tenant at will of the vendor, it has been held that, if while he is in actual possession, the sale goes off and he thereafter continues in possession, he becomes liable to the vendor for the reasonable value of the use and occupation of the premises for the period he remains in possession after the contract of sale is at an end. Under such circumstances the pur-

⁴⁹ *Gould v. Thompson*, 4 Met. (Mass.) 224, 229. A vendee going on the land who is to pay the purchase price at the expiration of a specified period on his failure to do so becomes a tenant at sufferance of the owner, though before that he may have been his tenant at will. *Sanders v. Richardson*, 14 Pick. (Mass.) 522. Where the owner of a barn moves it on the land of another while negotiations were in progress by which he expected to sell the barn to the owner of the land he is while the negotiations are pending a tenant at will of the owner of the land. If the negotiations had resulted in a completed contract for the sale of the barn the tenancy would

have been merged in the contract. But if the sale was never consummated the owner of the barn was still a tenant at will and is liable to the owner of the land for use and occupation of the land for the period he remained in possession after the negotiations for sale went off. But on the other hand he is entitled to a reasonable period thereafter to quit possession, during which period he cannot be charged with rent or use and occupation. The extent of the liability of the tenant at will in such a case is the reasonable value of the use and occupation. *Michael v. Curtis*, 60 Conn. 363, 368.

chase money which he has to pay but which, by reason of the sale going off, he now will not pay, cannot be regarded as the consideration for the agreement by the vendor to permit the vendee to remain in possession.⁵⁰ But in all such cases there is no remedy against the vendee by distress as no rent has been fixed by any agreement of the parties.⁵¹

§ 143. **Tenancy at will by holding over.** A tenant who, on the termination of his lease for a fixed term holds over with the consent of the landlord has in some cases been held to be a tenant at will.⁵² The almost universal rule, however, is that a holding over by a tenant for years creates a tenancy from year to year. The cases which are usually cited to sustain the proposition that a tenant holds over at will constitute exceptions to the general rule that a holding over with the consent of the landlord creates a tenancy from year to year under the terms of the lease which has expired. Upon an examination of the language of the court it will in most of the cases be found either that they have arisen in states where a holding over after the expiration of a term is made a tenancy at will by the statutory law of the jurisdiction,⁵³ or that the holding over was regarded by the parties as merely the giving of a license for some special purpose, or that the relationship of landlord and tenant never had existed between the party holding over and the owner of the prem-

⁵⁰ Howard v. Shaw, 8 M. & W. 118, 120, 10 L. J. Exch. 336; Tew v. Jones, 13 M. & W. 12; Winterbottom v. Ingham, 7 Q. B. 611, 14 L. J. Q. B. 298, 10 Jur. 4; Kirtland v. Pounsett, 2 Taunton, 145.

⁵¹ Howard v. Shaw, 10 L. J. Exch. 336; 8 M. & W. 118, 120.

⁵² Crommelin v. Thiess, 31 Ala. 412, 419, 70 Am. Dec. 499; City of Dubuque v. Miller, 11 Iowa, 583; Bennock v. Whipple, 12 Me. 346, 28 Am. Dec. 186; Kendall v. Moore, 30 Me. 327; Walker Ice Co. v. American Steele & Wire Co., 185 Mass. 463, 70 N. E. Rep. 937; Benfey v. Congdon, 40 Mich. 283; Hoffman v. Clark, 63 Mich. 175, 29 N. W. Rep. 695; McIntosh v.

Hodges, 110 Mich. 319, 70 N. W. Rep. 550; Overdeen v. Lewis, 1 Watts & S. (Pa.) 90, 37 Am. Dec. 440; Fall v. Moore, 45 Minn. 515, 48 N. W. Rep. 404; Matthews v. Hipp, 66 S. C. 162, 44 S. E. Rep. 577. A tenant holding over is a tenant at will and he may be turned out of possession without notice but it is otherwise if he has continued in possession for a year or rent has been received. Doe d. Hollingsworth v. Stennett, 2 Esp. 717, 5 R. R. 769.

⁵³ See Kendall v. Moore, 30 Me. 327; and O'Brien v. Troxell, 76 Iowa, 760; 40 N. W. Rep. 704. Construing Code of Iowa, § 2014.

ises,⁵⁴ or that the holding over was done and permitted by the parties not as a prolongation of the prior lease but while negotiations for a new and different lease were in progress⁵⁵ between them or that some other equally relevant and important circumstances existed which conclusively rebutted the ordinary presumption that tenant holding over his term is a tenant from year to year. For primarily the question always is in the case of a holding over what was the intention of the parties. And this intention, when it is ascertained, will be respected where there is no statute regulating the matter. So, too, where a tenant, on his landlord refusing to renew the lease for another term, except at a greatly increased rent which the tenant refuses to pay, continues in possession of a portion of the premises for the purpose of removing his fixtures with the assent of the landlord, while his subtenant of a part of the premises continues to hold possession for a month after the original lessee has moved and surrendered the key of another portion of the premises to the landlord, the tenant thus holding over becomes a tenant at will.⁵⁶

§ 144. **The occupancy of the premises incident to the employment of the occupant.** Whether an occupation of land by a person who, while an occupant of the land, is performing services for the owner of the land, constitutes the occupant a tenant at will of his employer, depends wholly upon the circumstances of each particular case and upon the express terms of the agreement between the parties. The primary inquiry in all cases where land is occupied and is used as an incident to services rendered by the occupant to the owner is directed to determine whether the relation of landlord and tenant exists at all or whether the permission to occupy the land is merely a license granted by the owner for his own convenience and revocable by him at pleasure. As soon as it is determined that the relationship is that of landlord and tenant the same tests may be applied to the facts appearing in the case to determine whether or not the tenancy is one at will as are ordinarily applicable in any case of tenancy which is shown expressly by language or by necessary

⁵⁴ Hoffman v. Clark, 63 Mich. 175, 178, 29 N. W. Rep. 695.

⁵⁵ Landsberg v. Tivoli Brewing Co., 10 Det. Leg. N. 63, 94 N. W. Rep. 197.

⁵⁶ Fall v. Moore, 45 Minn. 515, 48 N. W. Rep. 404.

implication from conduct. If the duration of the employment is uncertain so that the relationship of master and servant may be terminated by either at any time on notice, any tenancy arising out of such employment being equally uncertain and indefinite and terminable by the severance of the relation of master and servant will be a tenancy at will only. So, a minister of a dissenting congregation in England who had been placed in possession of a chapel and dwelling house by the trustees of the congregation upon his hiring by them to preach and was to live there free of rent with their consent while he should continue to be the minister of the congregation is merely a tenant at will of the trustees and his estate is terminated by a demand for possession.⁵⁷ The letting of the premises for a term which is expressly fixed and certain or the payment of a monthly rent by the servant has sometimes been held not material where the employment could be terminated at any time. So, a laborer who is hired by a farmer for a year who agrees to furnish him with a house while in his employ is a tenant at will of the farmer though the laborer is to receive a stipulated compensation for each month and he in turn is to pay a monthly rental for the house.⁵⁸

⁵⁷ Doe d. Nicholl v. McKeag, 10 Bar. & C. 721; Doe d. Jones v. Jones, 10 B. & C. 718, 8 L. J. (O. S.) K. B. 310.

⁵⁸ McGee v. Gibson, 1 B. Mon. (Ky.) 105. In a case in New Jersey where a person was employed by a canal company as a lock tender and as part compensation for his services as such was permitted to occupy a dwelling house and garden owned by the company under an express agreement "as long as he was in the employment of the company; and when he ceased to be so employed he was immediately to leave the house the court held that though the servant was a tenant there was no rent reserved and that he only remained a tenant while he performed services. The company

had the right to terminate the tenancy at pleasure and without the customary notice to quit required by the statute. The court regarded a rule of the company that a lock-tender who was discharged while occupying a house belonging to the company should immediately leave the house as not only reasonable but indispensable in the case of companies operating public works which provided dwellings for their employees convenient to their posts of duty where the purpose of their occupancy was to facilitate their business and convenience the public. The necessity of notice was dispensed with because of the possibility that while the time of the notice was running the performance of the duty of the employee

§ 145. The judgment debtor holding over after sale under execution. An execution debtor who is left in the occupancy of land which has been sold under an execution provided it be done with the consent, express or implied, of the purchaser at the execution sale, is a tenant at will of such purchaser upon the general principle that anyone who is in possession of real estate with the owner's consent, no term being fixed, is presumptively, and until the contrary appears, a tenant at will.⁵⁹ So, where a judgment creditor bought, under execution, land belonging to his judgment debtor but, pending an appeal from the judgment, expressly permitted the judgment debtor to remain in possession, the latter is a tenant at will of his creditor and continues to be so until notice to quit is served.⁶⁰ The implication of a tenancy at will under such circumstances is strengthened where the purchaser, being the plaintiff in execution, does not at once demand a deed from the sheriff but is satisfied with a certificate of sale from that official.⁶¹

§ 146. The lessee of a judgment debtor holding over after the sale under the execution. Inasmuch as the delivery of the deed of property which has been sold under an execution relates back to and conveys the title as of the date of the lien of the judgment, the execution of leased premises nullifies, as against the purchaser at the sale, all liens, alienations and incumbrances intermediate the judgment and the sale. Hence the rights of a lessee who has acquired his term after the judgment had become a lien on the demised premises, are totally divested by the execution sale and his continuance in possession after the execution sale cannot properly be regarded as an occupancy under his lease but as a tenancy at will of the purchaser at the execution sale to whom he will be liable for use and occupation.⁶²

might be suspended. *Morris Canal and Banking Co. v. Mitchell*, 31 N. J. Law, 99, 105.

⁵⁹ *Dobbins v. Lusch*, 53 Iowa, 304, 309. See, to same effect, *Jackson v. Sternbergh*, 1 Johns. Cas. (N. Y.) 153; *Nichols v. Williams*, 8 Cow. (N. Y.) 137; *Bryant v. Tucker*, 19 Me. 383.

⁶⁰ *Dobbins v. Lusch*, 53 Iowa, 304, 309.

⁶¹ *Munson v. Plummer*, 59 Iowa, 120, 122.

⁶² *Kane v. Mink*, 64 Iowa, 84, 86, 19 N. W. Rep. 852; *Dobbins v. Lusch*, 53 Iowa, 304, 309; *Bittinger v. Baker*, 29 Pa. St. 66, 70 Am. Dec. 154. See, also, *Kline v. Chase*, 17 Cal. 596.

§ 147. **The determination of the will—In general.** Upon a perusal of the common law authorities existing prior to the time of Blackstone, it will be found that there was much discussion as to what acts by the landlord amounted to a determination of the estate at will. The abrupt and arbitrary ending of a tenancy at will in a period when the population of England consisted almost wholly of small farmers holding their land under leases executed by the manor lords must necessarily in most cases have operated very unjustly as to the tenant and caused him a great inconvenience and loss if not actual and irretrievable ruin. This condition of affairs led the English judges to seek a remedy by which a tenant holding under such a precarious tenure might feel secure to some extent at least, that he would receive the reward of his labor in planting and tilling the ground which he held. The effect of this judicial legislation was seen first in the enunciation of the law relating to emblements in the case of all estates the duration of which was uncertain and particularly in the case of estates at will. At the same time by reason of the inattention and often because of the indulgence of the manorial lords a new kind of tenure or tenancy was created which had its origin in and was wholly founded upon mere tenancies at will but which differed from them by reason of its greater stability and security to the tenant. This was called copyhold tenure because the tenant was supposed to hold his estate under and by virtue of a copy of the court roll which was filed or deposited in the manorial court. The tenant was still a tenant at the will of the lord of the manor but the determination of the lord's will was no longer to be arbitrary and abrupt but exercised only according to the customs of the particular manor in which the land was located. The land having been held for some time by one lord, his acquiescence in the holding, with a knowledge on his part of the existing customs and local rules by and with reference to which similar land of his was held was regarded as estopping him from terminating the tenancy except under circumstances which had by custom become applicable to similar holdings under him. Inasmuch as the customs of the manor differed according to the humor and temper of the various lords, it followed that a copyhold tenant's estate, while always an estate at will, might, in conformity with local custom, be of any quantity or duration. Thus a copy-

holder may in some manors be tenant in fee simple or fee tail or for life, or by the curtesy or in dower, or for a term of years, though he was always liable to be deprived of his estate whatever it might be, on the concurrence of those circumstances, which according to the immemorial customs of the manor, constituted a termination of the tenancy, or in other words, on the happening of that particular event which justified the lord in determining the will. This in some manors was the want of male issue to the tenant; in others, the cutting of timber by the tenant, the non-payment of a fine or some similar thing. The copyholder, however, had no freehold interest strictly so called. He received no livery of seizin and the freehold of the manor continued in the lord with the use and occupation only granted to the copyhold tenant.⁶³

§ 148. **The termination of a tenancy at will by the death of either party to it.** As a general rule a tenancy at will is terminated by the death of either the lessor or the lessee.⁶⁴ And, after the death of the tenant at will, the relation of his successor to the landlord is that of a mere tenant at sufferance.⁶⁵ So, upon the death of a tenant at will his personal representative does not become a tenant at will but in case he enters, he is merely a trespasser or a tenant at sufferance. The landlord may accept him as a tenant at will or as a tenant upon any other sort of tenure but this will be a new letting, not the continuation of the former and the term created a new one. So, too, it has also been held that a tenancy at will is, *ipso facto*, terminated by the death of the landlord and it would seem that thereafter the tenant, so long as he remains in possession, is merely a tenant at sufferance of the heir of the landlord unless a new arrangement is made,⁶⁶ and the owner may enter or eject him at any time without notice to quit. The tenant at will is no longer liable on any covenant to pay rent after the death of his landlord. He is not

⁶³ 2 Black. Com. 148.

⁶⁴ *Cody v. Quarterman*, 12 Ga. 386; *Manchester v. Doddridge*, 3 Ind. 360; *Reed v. Reed*, 48 Me. 388; *Robie v. Smith*, 21 Me. 114; *Paige v. Wright*, 14 Allen (Mass.) 182; *Rising v. Stannard*, 17 Mass. 282, 284; *Ferrin v. Kenney*, 12 Met. (Mass.) 294, 296; *Say v.*

Stoddard, 27 Ohio St. 478, 483; *James v. Dean*, 11 Ves. 382, 391, 15 Ves. 236, 240, 8 R. R. 177.

⁶⁵ *Meier v. Thieman*, 15 Mo. App. 307.

⁶⁶ *Joy v. McKay*, 70 Cal. 445, 11 Pac. Rep. 763; *Reed v. Reed*, 48 Me. 388.

liable to the heir of the landlord for rent accruing after the death of the landlord. Hence in a case where the owner of land which is leased to a tenancy at will, dies, neither of his heirs to whom the land descends as tenants in common can maintain an action to recover rent for the land or to recover the reasonable value of its use and occupation after the death of the ancestor as the tenancy at will was actually terminated by the death of the latter.⁶⁷ All under tenancies which have been created by a tenant at will are put an end to by the latter's death or by the death of the primary landlord. The under tenants are not thereafter entitled to notice to quit,^{67a} as they are trespassers and not tenants of any sort so far as the original landlord is concerned. In England, however, the death of the landlord is not always regarded as raising a conclusive presumption of the termination of a tenancy at will. The facts attending the case will be inquired into, in order to ascertain if either by word or conduct the heir or reversioner has manifested an intention to continue the tenancy at will.⁶⁸ Nor does the rule that the death of a landlord terminates a tenancy at will apply in a case where the premises are owned by two or more persons as joint tenants for under such circumstances the principle of survivorship among the joint holders of the reversion is invoked and the tenancy at will is not put an end to by the death of any of the joint tenants but the lessee continues as the tenant at will of the survivor or survivors as the case may be.⁶⁹

§ 149. The partition of the demised premises by tenants in common. A partition of land among the several landlords will determine a tenancy at will of land, the reversion of which is owned by tenants in common. Before the partition is had each joint owner or owner in common has a right to occupy any part of the land and he may assign or transfer this right by a lease or conveyance to a stranger. But the lessee always takes subject to a partition. After a partition has taken place, each co-tenant holds only such part of the land as he has taken in severalty by the partition. And, as the lessor cannot on partition, without the consent of his co-tenants or co-owners, insist upon having set off to himself any particular portion he can convey no such

⁶⁷ *Eveleth v. Sawyer*, 96 Me. 227, 52 Atl. Rep. 639.

^{67a} *Robie v. Smith*, 21 Me. 214.

⁶⁸ *Morton v. Woods*, L. R. 4 Q. B. 306.

⁶⁹ *Henstead's Case*, 5 Coke, 10b.

privilege to his lessee. In view of these circumstances a voluntary partition of land which is owned in common is in law regarded as such an alienation of it as will put an end to a tenancy at will existing when the partition takes place.⁷⁰ So, a conveyance by three tenants in common partners in business to themselves and a fourth person, reducing the shares of each tenant in common from a third to a fourth is such an alienation as will determine an existing tenancy at will for by this a new owner is created with whom the tenant at will is in no wise connected.⁷¹

§ 150. Termination of the tenancy by the surrender and abandonment of the premises. It may be laid down as a well settled general rule that a tenancy at will may be terminated by a surrender of the premises by the tenant and an acceptance of possession by the landlord. Some cases dispense with the service of a notice to quit by either party upon the other.⁷² There are other cases which hold that a notice to quit if required by statute cannot be dispensed with in a tenancy at will except by an express agreement in the lease between the parties that the tenancy may be terminated without notice to quit. In other words where a statute provides the mode of determining the tenancy at will the statutory mode is exclusive of any other unless the parties at the time of the making of the lease shall provide for terminating it in some other way.⁷³ The parties to a tenancy at will may expressly dispense with the service of a statutory notice to quit. In all cases where a notice to quit is not required by statute a surrender and acceptance by the landlord terminates a tenancy at will.

§ 151. The termination of a tenancy at will by the landlord's alienation of the premises. A tenancy at will may be determined by the landlord by his alienation of the land. After this has been done the occupant who was theretofore a tenant at will of the grantor or vendor is merely a tenant at suffer-

⁷⁰ *Rising v. Stannard*, 17 Pick. (Mass.) 282, 284; *Ellis v. Paige*, 1 Pick. (Mass.) 43.

⁷¹ *McFarland v. Chase*, 7 Gray (Mass.) 462.

⁷² *Currier v. Perley*, 24 N. H. 219, 226; *Chalmers v. Vignand's Syndic*, Mart. (N. S.) 189; *Betz*

v. Maxwell, 48 Kan. 142, 29 Pac. Rep. 147. See, *Forbes v. Smiley*, 56 Me. 174; *Warner v. Page*, 4 Vt. 291, 24 Am. Dec. 607.

⁷³ *Davis v. Murphy*, 126 Mass. 143, 144; *Farson v. Gooddle*, 8 Allen (Mass.) 202; *May v. Rice*, 108 Mass. 150.

ance of the grantee.⁷⁴ The former tenant at will has after the sale of the premises only the rights of a tenant at sufferance as against his former landlord. Under most circumstances the motive of a sale by the landlord of a tenant at will is immaterial. A sale and conveyance of the premises has the same effect upon the tenancy whether made *bona fide* to some purchaser in good faith and for a valuable consideration or merely and exclusively for the purpose of terminating the tenancy to one who has knowledge of the purpose of the sale.⁷⁵ But where the tenancy at will is expressly to endure until the premises are sold, the sale and conveyance must have been made and executed in good faith and not merely to terminate the tenancy.⁷⁶ In the latter case as the tenant has the right of possession until the premises are sold he can only be deprived of this right by a real sale and conveyance. Otherwise the landlord might evict his tenant by a pretended sale long before the lease would naturally expire by a *bona fide* sale and the tenant would be without a remedy. A tenancy at will is determined by a mortgage of the premises where knowledge of the mortgage is brought home to the tenant. For a mortgage is an alienation of the interest of the landlord and brings the case under the rule that any alienation of the landlord's interest determines the tenancy at will, which depends for its continuance on the personal relation existing between the landlord and the tenant. This rule so far as it applies to a mortgage is not affected by the principle that the mortgagor still continues in possession and continues to exercise the rights and privileges of a landlord. After this alienation

⁷⁴ McLeran v. Benton, 73 Cal. 329, 14 Pac. Rep. 879, 883; Esty v. Baker, 50 Me. 325, 79 Am. Dec. 616; Howard v. Merriam, 5 Cush. (Mass.) 563, 574; Benedict v. Morse, 10 Met. (Mass.) 223, 229; Lash v. Ames, 171 Mass. 487, 50 N. E. Rep. 996; Keay v. Godwin, 16 Mass. 1; Rising v. Stannard, 17 Pick. (Mass.) 282, 284; Ellis v. Paige, 1 Pick. (Mass.) 43; Curtis v. Galvin, 1 Allen (Mass.) 215; Rooney v. Gillespie, 6 Allen (Mass.) 74; Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195; Howell

v. Howell, 7 Ired. L. (N. C.) 496; Co. Litt. 55b, 57a, 1 Cruise Dig. 273, 2 Black. Com. 150. The tenant cannot after the grant maintain an action in the nature of *quare clausum fregit* against the grantee, nor against one who acting under the directions of the grantee attempts to eject him from the premises. Curtis v. Galvin, 1 Allen (Mass.) 215, 217.

⁷⁵ Curtis v. Galvin, 1 Allen (Mass.) 215.

⁷⁶ Ela v. Banks, 37 Wis. 39.

the former tenant at will is a tenant at sufferance of the mortgagee, who may thereafter make him a tenant at will, if he shall choose to do so, but the mortgagor in possession cannot create a tenancy at will under such circumstances, which shall be binding on the mortgagee.⁷⁷ Inasmuch as a sale by the landlord terminating the tenancy at will is the voluntary act of the landlord over which the tenant has no control, the property rights of the tenant ought to be protected so that his loss may be reduced to a minimum. In fairness, the tenant at will, however, must be given reasonable notice by the landlord of his intention to sell the land so that he secure new premises, and he must also have a reasonable opportunity to remove his personal property, such as trade fixtures from the premises.⁷⁸ If the facts attending the giving of the notice of a sale are undisputed, the question of what is a reasonable notice and opportunity to remove the tenant's property is for the court.⁷⁹ What in other cases is reasonable notice of sale is a question of fact where there is a dispute as to the circumstances. Notice is required to be given by statute in some states. So, where the state statute requires a notice to be given by either party to the tenancy of an intention to terminate it a conveyance to a person as a trustee by the landlord of premises which are rented to a tenant at will, does not end the tenancy, unless notice to quit is given to the tenant.⁸⁰ The rule that a sale of the demised premises by the landlord determines a tenancy at will is based upon the fact that a tenancy at will is somewhat of a personal relation. The landlord in effect by the sale and conveyance says to his tenant "It is my will that I shall no longer be your landlord but that you shall have another landlord." And as a tenancy at will is at the will of both

⁷⁷ Doe d. Davies v. Thomas, 20 L. J. Ex. 367, 6 Ex. 854; Jarman v. Hale, 68 L. J. Q. B. 681 (1899), 1 Q. B. 994. Doubtless the opposite view of this matter would be taken by those courts where a mortgage is regarded as simply creating a lien upon the premises, and where the mortgagor being in possession is regarded as the true landlord.

⁷⁸ Ellis v. Paige, 1 Pick. (Mass.) 43, 49; Pratt v. Farrar, 10 Allen

(Mass.) 519, 521; Clark v. Wheelock, 99 Mass. 14, 14; Antoni v. Belknap, 102 Mass. 193, 200; Lash v. Ames, 50 N. E. Rep. 996, 997, 171 Mass. 487.

⁷⁹ Lash v. Ames, 171 Mass. 487, 50 N. E. Rep. 996.

⁸⁰ So held in Iowa under Code, § 2991, requiring thirty days in writing to be given to either party to terminate a tenancy at will. German State Bank v. Herron, 111 Iowa, 25, 82 N. W. Rep. 430.

the landlord and the tenant, the tenant cannot become the tenant at will of the new owner unless he shall accept him as such. Until such an acceptance he is a trespasser or at most a tenant at sufferance as regards the grantee. This rule has been applied to involuntary conveyances. So, where a lessor of a tenancy at will becomes insolvent the appointment of an assignee in insolvency for him with the knowledge thereof by the tenant terminates the tenancy. The tenant remaining in possession thereafter with knowledge of the assignment becomes and continues a trespasser.⁸¹ An assignment or a conveyance of the reversion by the lessor does not affect the tenant at will unless or until he has notice or knowledge of it. Express notice to the tenant is not necessary. It is enough if the assignee of the reversion shall inform him of the assignment or the tenant acquires knowledge of it having taken place in any other way. So, though the lessor may terminate the tenancy by an entry during the absence of the lessee, he cannot terminate the tenancy by words spoken elsewhere unless the tenant shall have notice of the words. In other words, the tenant, though absent from the premises is presumed to have knowledge or notice of what takes place on the land but not of what occurs elsewhere. So the occurrence of anything of which the tenant cannot be presumed to have notice does not terminate the tenancy until notice is brought home to the tenant.⁸² And in conclusion it is well settled that a tenant at will may, during the tenancy, remove all structures which he has erected upon the land with the consent of the landlord, where the landlord determines the will by selling the estate.⁸³

§ 152. Denial of the title of the landlord by a tenant at will.

In conformity with the general rule, if the tenant at will denies the title of his landlord to the premises or does any act which is inconsistent with a recognition and admission of the

⁸¹ Doe d. Davis v. Turner, 6 Exch. 854.

⁸² "If a man lease a manor at will whereunto a common is appended, if the lessor put his beasts to use the common, this is a determination of the will. The lessor may by actual entry upon the ground, determine his will in the absence of the lessee, but by words

spoken from the ground the will is not determined until the lessee hath notice." Co. Litt. 55b.

⁸³ Walton v. Wray, 54 Iowa, 531, 6 N. W. Rep. 472; Melhop v. Meinhart, 70 Iowa, 685, 28 N. W. Rep. 545; Mickle v. Douglas, 75 Iowa, 82, 39 N. W. Rep. 198; Wilgus v. Gettings, 21 Iowa, 178; Merchants National Bank v. Stan-

title by him as by accepting a conveyance of the premises from a person other than the landlord and asserting his title under it, the tenancy at will is at an end. The tenant is then no longer a tenant but a trespasser, so far as the landlord is concerned, and the landlord may bring an action to recover the property from him as trespasser or he may, if he can do so without violence, repossess himself of the premises.⁸⁴ So where the tenant disclaims or disavows the tenancy, repudiates the relationship of landlord and tenant, or claims he holds under another person the tenancy at will is at an end without the service of any notice to quit.⁸⁵ If the tenant at will claims to hold the land as his own and so notifies his landlord his possession becomes adverse to his landlord from such notification. The landlord is then under the necessity of taking the proper steps to prevent the adverse claim from ripening into a good title by reason of peaceable and uninterrupted possession under the statute of limitations.⁸⁶ While the tenancy at will exists the

ton, 55 Minn. 211, 56 N. W. Rep. 821; Carlin v. Ritter, 68 Md. 478, 13 Atl. Rep. 376.

⁸⁴ Tillotson v. Kennedy, 5 Ala. 407, 39 Am. Dec. 330; Sampson v. Shaefer, 3 Cal. 196, 205; Simpson v. Applegate, 75 Cal. 342, 17 Pac. Rep. 237; McCarthy v. Brown, 113 Cal. 15, 45 Pac. Rep. 14; Fusselman v. Worthington, 14 Ill. 135; Farrow's Heirs v. Edmundson, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; Little v. Palister, 4 Me. 209, 211; Currier v. Earl, 13 Me. 216; Bodwell Granite Co. v. Lane, 83 Me. 168, 172; Campbell v. Proctor, 6 Me. 12; Bennoch v. Whipple, 12 Me. 346, 28 Am. Dec. 186; Appleton v. Ames, 150 Mass. 34, 44, 22 N. E. Rep. 69, 5 L. R. A. 206; Amick v. Brubaker, 101 Mo. 473, 477, 14 S. W. Rep. 627; Ramsey v. Henderson, 91 Mo. 560, 4 S. W. Rep. 408; Russell v. Fabyan, 34 N. H. 218, 223; Pettengill v. Evans, 5 N. H. 54; Love v. Edmonston, 23 N. Car. 152; Chamberlain v. Don-

ohue, 45 Vt. 50, 55; Hall v. Dewey, 10 Vt. 593, 599; Willison v. Watkins, 3 Peters (U. S.) 43. A statute requiring the service of a notice to quit by the landlord has been held not to apply to such a termination of the tenancy as the court will regard this as a surrender. Amick v. Brubaker, 101 Mo. 473, 477, 14 S. W. Rep. 627; Ramsey v. Henderson, 91 Mo. 560, 4 S. W. Rep. 408.

⁸⁵ Appleton v. Ames, 150 Mass. 34, 44, 22 N. E. Rep. 69, 5 L. R. A. 206. The action of a subtenant who upon the termination of the term of his lessor became the tenant at will of the original landlord in refusing to pay rent to the latter denying his title and claiming the ownership in himself puts an end to the tenancy at will. Appleton v. Ames, 150 Mass. 34, 22 N. E. Rep. 69.

⁸⁶ Hall v. Dewey, 10 Vt. 593, 599.

possession of the tenant is the possession of the landlord. But as soon as the disclaimer of title or adverse claim by the tenant is brought to the knowledge of the landlord or of his agent who is duly authorized to receive it the statutory period of limitation begins to run against the landlord. What shall constitute notice to the landlord of an adverse holding by the tenant depends on the facts of each case. The claims of ownership by the tenant publicly made, his alienation of the land in fee, and his delivering possession of it to others would be probably regarded as such acts.⁸⁷ A mortgage of the fee of the premises by the tenant at will is such a claim of an adverse holding and repudiation of the landlord's title as will determine the tenancy at will. And where the mortgage by the tenant at will has been foreclosed for a default on the part of the mortgagor, and the land sold and bought by the mortgagee who has also entered into possession he as well as the tenant may be treated as a trespasser and ousted by the landlord who was not a party to the suit to foreclose.⁸⁸ Where a judgment debtor on the levy of an execution on land which he held as tenant at will points out the land as his own property in fee and aids in setting it off for the deputy sheriff who makes the levy, his acts will amount to a determination of the tenancy. Such conduct on his part is an unequivocal disclaimer of his landlord's title and so clearly inconsistent with an estate at will as to put an end to it. The purchaser at the sale under the judgment takes no title and the landlord may maintain an action against the judgment creditor for his entry on the land.⁸⁹

§ 153. **The tenancy at will may be determined by the giving of a new lease.** A tenancy at will is terminated by the landlord leasing the demised premises to a third person and the tenant at will is thereafter a tenant on sufferance of his landlord.⁹⁰ The tenancy at will is terminated by knowledge of the new lease to

⁸⁷ *Farrow's Heirs v. Edmundson*, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250.

⁸⁸ *Little v. Palister*, 4 Me. 209.

⁸⁹ *Campbell v. Procter*, 6 Me. 12.

⁹⁰ *Cunningham v. Holton*, 55 Me. 33; *Hildreth v. Conant*, 10 Met. (Mass.) 298; *Kelly v. Waite*, 12

Met. (Mass.) 300; *Mizner v. Moore*, 10 Gray (Mass.) 290; *Pratt v. Farrar*, 10 Allen (Mass.) 519; *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. Rep. 824, 55 Am. Rep. 462; *Grundy v. Martin*, 143 Mass. 279; *Cofran v. Shepard*, 148 Mass. 582, 20 N. E. Rep. 181.

the third person being given to the tenant after which he must be allowed a reasonable period to remove his fixtures. The entry of the new tenant is not necessary under such circumstances to terminate the tenancy for the letting at once terminates the tenancy at will, on notice to the tenant. For the tenant at will is not liable as a trespasser for his occupancy of the premises subsequently to the determination of the will by an alienation for years or in fee until he shall have notice of the alienation.⁹¹

Where the land is owned by a husband and his wife as tenants by the entirety the husband has at the common law the right to lease the same which lease will be valid and binding on the wife during the coverture but will terminate in case she shall survive him. Hence the execution and delivery of a written lease of a wife's lands by the husband during the coverture, will determine an existing tenancy at will in her lands, made by her before or after the date of the marriage, and though the lease was made by the wife with the consent of the husband.⁹² There must however be a new lease in fact to a new tenant, *i e.*, to some third person. A mere change in the character of the tenant at will without a corresponding change of person does not terminate the tenancy at will. Thus a mere change in the personnel of a firm which is a tenant, and its change from a partnership to a corporation, which is acquiesced in by the lessor do not terminate a tenancy at will where there is no interruption of the actual occupancy.⁹³

§ 154. The entry of the landlord on the land as terminating the tenancy. At the common law the entry of the landlord upon the land and the doing by him of any act while there in possession which is inconsistent with an estate at will operate as a determination of the tenancy. Thus if the lessor after his entry on the land cuts down trees, carries away stone,⁹⁴ removes a house, or makes a feoffment on the land or a lease for years to commence at once the tenancy at will is at an end.⁹⁵ Thus in

⁹¹ Kelly v. Waite, 12 Met. (Mass.) 300; Howard v. Morris, 5 Cush. (Mass.) 563; Disda v. Ives, 2 Lev. 88.

⁹² Pray v. Stebbins, 141 Mass. 219, 224, 4 N. E. Rep. 824, 55 Am. Rep. 462.

⁹³ Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463. 70 N. E. Rep. 937.

⁹⁴ Turner d. Doe v. Bennett, 9 M. & W. 643.

⁹⁵ Moore v. Boyd, 24 Me. 242; Kelly v. Waite, 12 Met. (Mass.)

England a feoffment with livery of seizure made on the land, determines a tenancy at will though the tenant at will is not present, and does not assent to the feoffment; and feoffee may maintain trespass against the tenant at will, even though the latter had no notice of the feoffment.⁹⁶ And though the intent with which an entry by the landlord is made is usually important, yet in the case of a tenancy at will whatever may have been the intent of the lessor in entering any act by him which would otherwise be a trespass on the land determines the tenancy.⁹⁷ So, also a demand of possession made by the landlord upon the land of the tenant at will or of his lessee is a determination of the estate at will.⁹⁸ In fact the landlord's entry upon the demised premises and his utterance of any words there clearly expressive of his present intention to determine the estate of the tenant constitute a termination of the tenancy at will.⁹⁹ But in order that the entry of the landlord on the land and his utterance of words there declaring the tenancy to be at an end shall terminate the tenancy it is the rule in this country at least that the tenant shall have notice of such words,¹ either by his being present on the land and hearing them when they are spoken, or by their utterance being subsequently brought to his

300, 302; *Rising v. Stannard*, 17 Mass. 282, 286; *Klay v. Godwin*, 16 Mass. 1, 4, 2 Bl. Com. 146, 150; 1 Cruise, Tit. 9, c. 1, § 18; Co. Lit. 55b; *Doe d. Davies v. Thomas*, 6 Exch. 854, 857, 11 L. J. Ex. 453.

⁹⁶ *Ball v. Cullimore*, 2 C. M. & R. 120, 1 Gale. 96, 5 Tyr. 753, 4 L. J. Ex. 137, 2 Black. Com. 146.

⁹⁷ *Turner v. Doe dem. Bennett*, 9 M. & W. 643, 646.

⁹⁸ *Roe d. Blair v. Street*, 4 N. & M. 42, 2 Ad. & El. 329, 4 L. J. K. B. 67; *Howell v. Howell*, 7 Ired. Law (N. C.) 496. See, also, as to the effect of a demand for possession contained in a letter sent from the attorney of the lessor to the attorney of the lessee, stating that unless the latter paid the lessor what he owed him for rent

he would take measures to obtain possession. *Doe d. Price v. Price*, 2 M. & Scott, 464, 9 Bing. 356.

⁹⁹ *Effect of a demand of keys.* Where a person, who has had the keys of the house given him to enable him to examine the premises, moves in his furniture and family, he is a tenant at will if the landlord assents, and where the landlord afterward sends for the keys and upon the refusal of the occupant to deliver them enters himself and turns out the party and his goods it was properly held that the tenancy at will was thus terminated. *Pollon v. Brewer*, 7 Com. Bench (N. S.) 371, 6 Jur. (N. S.) 509.

¹ *Cook v. Cook*, 28 Ala. 660.

attention. Then tenancy at will expires when he receives notice or knowledge of the entry and the language of the landlord.

§ 155. **Notice to quit when required in tenancies at will at common law.** A tenancy at will may be terminated at the will of either party at common law and neither party is according to the majority of the cases in the absence of statute, obligated to give notice of a future day on which the tenancy and estate shall terminate.² This rule has been confined to cases of a strict tenancy at will and to those in which the character of the tenant's holding was such that his status closely approached that of a mere trespass. In some cases in the absence of a statutory provision for notice to quit the courts have stated that a reasonable notice must be given whose length is always dependent upon the circumstances of each case but in any event to be long enough to enable the tenant to remove the implements, furniture and other personal property.³ As determining whether, in the absence of any statute expressly requiring a notice to quit to determine a tenancy at will, such a notice is indispensable, some of the cases have turned upon a distinction which the courts have made or recognized between tenancies at will in fact, *i. e.* tenancies which have been expressly created by the intention of the parties or which have been implied from their conduct and between tenancies which have been declared to be tenancies at will by virtue of the Statute of Frauds. In England in the former class of tenancies at will no notice to quit has ever been required to be given either by statute or at common law.⁴ Cases where a tenant is in possession under a parol lease which the Statute of Frauds has transformed into a tenancy at will are on a different basis, for in the case of such a lease where it is evident that the parties to the contract had intended to create a tenancy differing in many very material respects from a tenancy at will and particularly

² *Peters v. Blake*, 170 Ill. 304, 48 N. E. Rep. 1012; affirming 68 Ill. App. 587; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Davis v. Thompson*, 13 Me. 209; *Moore v. Boyd*, 24 Me. 243; *Kenin v. Guvernator* (N. J. Law) 48 Atl. Rep. 1023; *Peer v. O'Leary*, 28 N. Y. Supp. 687, 8 Misc. Rep. 350; *Rich v. Bolton*, 46 Vt. 84; *Chamberlain v.*

Donohue, 45 Vt. 50; *Hollingsworth v. Stennett*, 2 Esp. 717; *Tilt v. Stratton*, 4 Bing. 446; *Right v. Baird*, 13 East, 210.

³ *Ellis v. Paige*, 1 Pick. (Mass.) 43.

⁴ *Right v. Beard*, 13 East, 210; *Knight v. Quigley*, 2 Camp. 505; *Hollingsworth v. Stennett*, 2 Esp. 717.

where a yearly rent had been reserved in the invalid lease, no court of justice would hesitate in endeavoring to protect the tenant from serious injustice, and, in order to effect such purpose would require a reasonable notice to terminate the tenancy at will created by the express provision of the statute. In other words the Statute of Frauds, being in derogation of the common law was strictly construed. The tenant was not permitted to be deprived of any right he might have enjoyed at common law before the passage of the statute and among these rights was the right on the part of the tenant of receiving a reasonable notice to quit, usually of six months, in the case of tenancies from year to year. Hence in all tenancies at will under the statute reserving an annual rent, six months' notice is required to terminate the tenancy at will.

⁵ *Right v. Darby*, 1 T. R. 159; *Share v. Parter*, 3 T. R. 13; *Timmins v. Rowllison*, 3 Burr. 1603; *Rising v. Stannard*, 17 Mass. 282; *Rich v. Bolton*, 46 Vt. 84, 89. "It was determined very anciently at the common law, upon principles of justice and policy that estates at will were equally at the will of both parties and neither of them was permitted to exercise his will in a wanton and arbitrary manner, and contrary to equity and good faith but they could only be terminated by notice for a longer or shorter period depending usually upon the nature of the original demise. At first there was no other rule than that the notice should be a reasonable one. Because of the uncertainty of this rule the courts early adopted, as far as possible, some fixed period as being reasonable. In those tenancies, which from the nature of the original demise, they construed to be tenancies from year to year the courts adopted six months as a reasonable notice holding that such tenancies could

only be determined by a notice of at least six months terminating at the expiration of the first or any succeeding year. And in those cases which did not come within the class of tenancies from year to year, because by implication for some definite period less than a year, the rule was generally adopted that the time of notice should be governed by the length of time specified as the interval between the times of payment and should be equal to one of these intervals, and must end at the expiration thereof. The result was that at the common law estates at will in a strict sense became almost extinguished at a very early date under the operation of judicial decisions. Indeed it would have been difficult to conceive of such a tenancy, except by the express contract of the parties to that effect. But they still remained substantially tenancies at will, except that such will could not be determined by either party without due notice to quit." The Court by Mitchell, J., in *Hunter*

§ 156. Notice to quit and demand of possession as terminating a tenancy at will. Though a very great majority of the cases hold that a notice to quit is necessary to terminate a tenancy at will both at common law and under the statutes of the various states, there are a few cases which hold that the tenancy may be ended *instantly* by a demand of possession by the landlord.⁶ If the tenant at will has done or suffered anything to be done which in law constitutes a termination of the tenancy at will, he is estopped thereafter from claiming that the landlord must serve a notice to quit upon him before he can be ousted. This would be the case where the tenant, pending a tenancy at will disavows his landlord's title and alleges that a third person owns the property or claims that he himself owns it, after which he of course holds adversely and is a trespasser and not a tenant at all and not entitled to notice. Under such circumstances a demand of possession is usually sufficient.

§ 157. Statutory notice required to terminate a tenancy at will. In many of the states it is required by statutes that a notice of a length therein specified shall be necessary to terminate a tenancy at will. In California,⁷ Maine,⁸ New York,⁹ Mis-

v. Frost, 47 Minn. 1, 49 N. W. Rep. 327; and see, also, Tobin v. Young (Ind. 1888) 17 N. E. Rep. 625, 628.

⁶ Duane v. Trustees, 39 Ill. 578; Love v. Edmonston, 23 N. Car. 152; Howell v. Howell, 29 N. Car. 496, 47 Am. Dec. 335. See, also, 2 Black. Com. 146.

⁷ Kuhn v. Smith, 125 Cal. 615, 58 Pac. Rep. 204; Carteri v. Roberts, 140 Cal. 164, 73 Pac. Rep. 818. Construing California Civ. Code, §§ 789, 790, and see, also, King v. Connolly, 51 Cal. 181.

⁸ Rev. St. 1858, c. 94, §§ 1, 2. But it is said, however, that this statute relates only to the notice necessary to maintain an action of forcible detainer and that a landlord of a tenant at will may enter at any time without notice. Gordon v. Gilman, 48 Me. 473; With-

ers v. Larabee, 48 Me. 570. See also as to length of notice required in Maine. Davis v. Thompson, 13 Me. 209; Sherburne v. Jones, 20 Me. 70; Wheeler v. Cowan, 25 Me. 283. It is said, however, in Gordon v. Gilman, 48 Me. 473, that the rights of tenants at will to have notice are determined by the statute in force when the question arises. A termination of the tenancy by mutual consent dispenses with the service of the statutory notice. Thomas v. Sanford, 71 Me. 548.

⁹ 4 Rev. St. (8th Ed.) p. 2457, § 7. See, also, Post v. Post, 14 Barb. (N. Y.) 253; Livingston v. Tanner, 14 N. Y. 64; Burns v. Bryant, 31 N. Y. 453; Larned v. Hudson, 60 N. Y. 102. A person who holds the premises under a mere license is not entitled to no-

souri,¹⁰ Michigan,¹¹ Iowa,¹² Minnesota,¹³ New York,¹⁴ a thirty days' notice to quit is required to terminate a tenancy at will. The same period is applicable in Delaware to estates at will.¹⁵ In Oregon, a notice equal to the intervals between the payment of rent is required.¹⁶ In Rhode Island written notice is required but it may be of any length that pleases the party giving it. It need not be a reasonable notice.¹⁷ In New Jersey a three months' notice to quit is required both in tenancies at will and tenancies at sufferance.¹⁸ In Michigan it is provided¹⁹ that all estates at will, where the rent is payable at periods less than three months, may be determined by notice equal in time to the interval between the rental payments. In Vermont six months' written notice to

tice under the New York statute as a tenant at will. *Doyle v. Gibbs*, 6 Lans. (N. Y.) 80.

¹⁰ Rev. St. § 3078 construed in *Tarlotting v. Bokern*, 95 Mo. 541, 8 S. W. Rep. 547; *Carby v. McSpadden*, 63 Mo. App. 648.

¹¹ Comp. Laws 1897, § 9257, construed in *Simons v. Detroit Twist Drill Co.*, 11 Detroit Leg. N. 141, 99 N. W. Rep. 862.

¹² *Kuhn v. Kuhn*, 70 Iowa, 682, 28 N. W. Rep. 541; *Burden v. Knight*, 82 Iowa, 584, 48 N. W. Rep. 985; *German Bank v. Herron*, 111 Iowa, 25, 82 N. W. Rep. 430.

¹³ Minn. Gen. St. § 5873; *Grace v. Michaud*, 50 Minn. 139, 52 N. W. Rep. 390; *Eastman v. Vetter*, 58 N. W. Rep. 989, 57 Minn. 164; *Hunter v. Frost*, 47 Minn. 1, 49 N. W. Rep. 327; Gen. St. Minn. c. 75, § 40; *Van Brunt v. Wallace*, 88 Minn. 116, 92 N. W. Rep. 521.

¹⁴ *Peer v. O'Leary*, 28 N. Y. S. 687, 8 Misc. Rep. 350, 59 St. Rep. 594, holding also that it is not necessary that the notice expire at the end of a month.

¹⁵ *Bonsall v. McKay*, 1 Houst. (Del.) 520.

¹⁶ *Forsythe v. Pogue*, 25 Oreg.

481, 36 Pac. Rep. 571; Hill's Code, § 2987.

¹⁷ *Payton v. Sherburne*, 2 Atl. Rep. 300, 15 R. I. 213.

¹⁸ *Kenin v. Guvernator* (N. J. Law), 48 Atl. Rep. 1023, construing Laws 1898, p. 556, § 109. This notice, it seems, may be oral. *Kenin v. Guvernator* (N. J. Law), 48 Atl. Rep. 1023. It has also been held in New Jersey that a half year's notice to quit is requisite in all cases of uncertain tenancy. *McEowen v. Drake*, 14 N. J. Law, 523; *Hankinson v. Blair*, 15 N. J. Law, 181.

¹⁹ How. Ann. St. § 5774.

²⁰ *Barlum v. Berger*, 125 Mich. 504, 84 N. W. Rep. 1070; *Holmes v. Wood*, 88 Mich. 435, 50 N. W. Rep. 323; *Huyser v. Chase*, 13 Mich. 98. A statute in Michigan is applicable to a tenancy void under the Statute of Frauds. *Huyser v. Chase*, 13 Mich. 98; and to a tenancy from month to month without an understanding that the tenant would vacate when possession was required by the landlord. *Woodrow v. Michael*, 13 Mich. 187. The statutory notice which is required in Michigan is

quit is required.²¹ By some of the cases it has been held that the statutory requirement that a tenancy at will can only be terminated on notice, is to be strictly complied with. It is binding on the tenant as well as on the landlord. An implied surrender will not be recognized as notice as when for example a tenant at will, without giving his landlord the statutory notice in writing sends or hands the landlord the key of the premises or leaves it at his office or residence with a person whom he finds in charge.²² But the acceptance of a surrender by the landlord may dispense with notice. By very many of the cases it has been held that a statute requiring a notice to quit in the case of a tenancy at will does not apply where the tenant voluntarily does some act which when it has been assented to by the landlord will constitute a surrender. Such statutes requiring notice do not usually preclude the parties from terminating the tenancy by voluntary agreement nor do they prevent the tenancy from being put an end to by any act which in law will terminate the relation of landlord and tenant as, for example, where the tenant denies the title of his landlord by holding adversely and the landlord may then treat him as a trespasser.²³ Where a statutory enactment requires a notice to be given in order to terminate a tenancy at will the tenancy of course will continue until the expiration of the period mentioned in the notice and the possession and occupation of the tenant are a lawful possession and

dispensed with in the case of a tenancy on condition though it is required in the case of a tenancy at will. But in the latter case the tenant is entitled to a reasonable notice and in determining what a reasonable notice is the courts will be guided by the statutory requirements of notice in the case of a tenancy at will. *Shaw v. Hoffman*, 25 Mich. 162. See, also, *Hilsendeger v. Scheich*, 55 Mich. 468, 21 N. W. Rep. 894, holding that a notice to quit indispensable to the recovery of the possession. In the absence of any agreement by a tenant at will to pay rent at shorter intervals than three

months a tenant is entitled to receive a three months' notice to quit under the Michigan statute. *How. Am. Statute*, § 5774. *Hoffman v. Clark*, 63 Mich. 175, 29 N. W. Rep. 695.

²¹ *Blanchard v. Powers*, 67 Vt. 403, 31 Atl. Rep. 848.

²² *Barlow v. Wheelwright*, 22 Vt. 88; *Withers v. Larrabee*, 48 Me. 570, 573.

²³ *Jackson v. French*, 3 Wend. (N. Y.) 337; *Chamberlain v. Donohue*, 45 Vt. 50; *Wilson v. Watkins*, 3 Pet. (U. S.) 43; *Amick v. Brubaker*, 101 Mo. 473, 14 S. W. Rep. 627.

occupation until that day arrives.²⁴ He may enforce all his rights as a tenant against both the landlord and strangers until the expiration of the period of the notice. And it follows from this the tenant will be liable for rent during the time of the notice given for the determination of the estate whether he continues to occupy the premises or not.²⁵

§ 158. **The termination of the period of notice.** A notice to quit which is required under a statute in a tenancy at will may if served a sufficient time prior to the commencement of possessory proceedings require the tenant to quit at any day.²⁶ So, a notice to quit at the expiration of fourteen days is a good notice under a statute requiring a three months' notice to quit where no proceedings are instituted within three months.²⁷

²⁴ *Smith v. Rowe*, 31 Me. 312; *Withers v. Larrabee*, 48 Me. 570.

²⁵ *Withers v. Larrabee*, 48 Me. 570, 573. The contrary was held in *Betz v. Maxwell*, 48 Kan. 142, 29 Pac. Rep. 147. In that case a tenant at will deserted the premises which he had under the lease without giving notice to quit. A notice to quit was required by the statute. Then the landlord entered upon the premises. It was held that the giving of the notice required by the statute was dispensed with and that the landlord could not recover rent for any portion of the term which elapsed after he took possession.

²⁶ *Stickney v. Burke*, 64 N. H. 377, 10 Atl. Rep. 852.

²⁷ *Hogsett v. Ellis*, 17 Mich. 351. "When tenancies at will are terminated by notice, the real question is not how long a notice shall be given, or is requisite to terminate it. Notice to quit the possession, or something equivalent to it, terminates it, and the question necessarily remaining is how long a time has the tenant to vacate the premises? Under a notice

to quit, or upon the termination of a tenancy at will in any other manner, a tenant has the right to a reasonable time to vacate the premises, depending upon the circumstances of the case. Under a lease of agricultural lands he may be entitled to emblements, and can remain long enough after the lease determines to gather the crops that he has sown, which may be for the greater part of the year. In a lease of buildings the tenant, when the lease ends, may have nothing in them, and so would need no time to vacate them. In a case like the one at bar, where the premises are used for the storage of heavy machinery, the lessee should have reasonable time to procure other accommodations and remove his property. A case might arise where it would be necessary to erect buildings. Store-houses might be plenty in the vicinity or there might be none. No rule can be laid down to apply to all cases." The court, by Taft, J., in *Amsden v. Floyd*, 15 Atl. Rep. 332, 60 Vt. 386.

§ 159. The commission of waste by a tenant at will. Voluntary waste when it is committed by a tenant at will is *ipso facto* a determination of the tenancy at will and the tenant is thereafter a tenant at sufferance. He has also been said in some case to be a trespasser thereafter so that an action in the nature of *quare clausum fregit* may be maintained against him by the landowner or landlord.²⁸ This liability to a forfeiture and to an action for trespass is in theory based upon an implied covenant on the part of the tenant at will to use the demised premises in a proper manner. He will be liable accordingly in the case of a demise of a farm for cutting timber for other purposes than the repair of fences which it is his duty to keep in repair or if he allows a meadow to be injured and fruit trees or other trees to be destroyed.²⁹ In the case of land not intended to be used for farming purposes the same principle is applicable. The covenant to use the demised premises in a proper and suitable manner which is implied in every lease is regarded as a condition subsequent in the case of tenancy at will the breach of which shall operate as a forfeiture. Whether there has been waste is determined by general rules and principles. The authorities are not at all harmonious upon the question whether the landlord in a tenancy at will can terminate it because the tenant is guilty of permissive waste as distinct from voluntary waste. Several of the English cases hold that the lessor cannot determine the tenancy at will on account of permissive waste by the tenant for the reason that the provisions of the Statute of Gloucester requiring the tenant to be accountable for permissive waste refer only and exclusively to tenants for years.³⁰ But on the other hand it has been held in England that a tenant for years may recover against his tenant at will for permissive waste, and this rule is based upon the reasoning that, inasmuch as the tenant for years is liable to his landlord for the permissive waste of his sub-

²⁸ Daniels v. Bond, 21 Pick. (Mass.) 367, 371, 32 Am. Dec. 269; Phillips v. Covert, 7 Johns. (N. Y.) 1. See, also, Suffern v. Townsend, 9 Johns. (N. Y.) 35; Wright v. Roberts, 22 Wis. 161; Pettengill v. Evans, 5 N. H. 54; 2 Black.

Com. 146; Co. Litt. 55b; Countess of Shrewsbury's Case, 5 Coke, 13b.

²⁹ Chalmers v. Smith, 152 Mass. 561.

³⁰ Pomfret v. Ricroft, 1 Saund. 323a; Harnett v. Maitland, 16 Mee. & Wel. 256, 262.

tenant, he ought to have a remedy over against the person who is in fact responsible for the permissive waste.³¹

§ 160. **The assignability of the tenant's interest in an estate at will.** The proposition is sometimes laid down in the cases very broadly that a tenant at will cannot assign his term or estate without the consent of his landlord. If this be true in its general sense its truth depends rather upon the character of the tenant's interest or term which is always uncertain and defeasible at the will of the landlord, than upon any inherent incapacity in the lessee to assign. Owing to this *quasi* lack of assignability of the tenant's interest in a term at will a person who enters upon the premises under an assignment from the tenant at will is a disseizor or trespasser so far as the lessor is concerned and he may maintain trespass against him without giving him notice to quit.³² Hence from this it follows that the assignment of the tenant's interest does not *per se* make his assignee a tenant at will.³³ If, however, the landlord sues the assignee of the tenant at will for rent or for use and occupation and the assignee pays the rent claimed or the landlord receives the value of the use and occupation the assignee will be then regarded as a tenant at will and the landlord will be estopped by his conduct to assert the contrary.³⁴ An under lease by the tenant at will may have the same effect on the duration of the tenancy as an assignment. It is not material to the general principle that the attempted under lease or assignment by the tenant at will is void.³⁵ It cannot be

³¹ *Panton v. Isham*, 1 Salk. 19; *Cudlip v. Rundle*, Carth. 263.

³² *Cunningham v. Holton*, 55 Me. 33, 36; *Reckhow v. Schank*, 43 N. Y. 448; *Austin v. Thompson*, 45 N. H. 117. See, also, *Cooper v. Adams*, 6 Cush. (Mass.) 87; 1 Cruise Dig. 244, tit. 19, c. 1, § 7. As to the non-assignability of the interest of a tenant at will, see further *Packard v. Cleveland*, etc., Co., 46 Ill. App. 244, 245; *Whittemore v. Gibbs*, 24 N. H. 484, 489; *Dark v. Donelson's Lessee*, 2 Yerg. (Tenn.) 249, 24 Am. Dec. 485; *Appleton v. Ames*, 150 Mass. 34,

44, 22 N. E. Rep. 69, 5 L. R. A. 66; *Cooper v. Adams*, 6 Cush. (Mass.) 87; *King v. Lawson*, 98 Mass. 309; *Howell v. Howell*, 29 N. Car. 496, 47 Am. Dec. 335; *Melling v. Leake*, 16 Com. Bench (N. S.) 652; *Pinhorn v. Souster* 8 Exch. 763. A tenant at will has no estate which he can assign to any other person. *Dingley v. Buffum*, 57 Me. 581.

³³ *King v. Lawson*, 98 Mass. 309.

³⁴ *Cunningham v. Holton*, 55 Me. 33.

³⁵ *Birch v. Wright*, 1. T. R. 378.

said however that the assignment or under lease *ipso facto* renders the tenancy at will at an end. For a tenancy is at the will of both parties and if the assignment is without the knowledge of the landlord it does not determine the will until he knows of it. Nor will the assignment work a determination of the will and put an end to the relation of landlord and tenant until knowledge of it has come to the landlord and the latter has done some act which indicates his intention to terminate the estate at will. If the landlord shall expressly or by implication elect to treat the original tenancy at will as continuing after the assignment he may do so and continue to hold the original tenant liable for the rent. If on the other hand he shall elect to regard the assignment or subletting as a termination of the tenancy at will the original lessee is thereafter free from responsibility to him and the landlord may either treat the subtenant as a trespasser or as a tenant at will unless he shall proceed to enter into other arrangements with him as to his tenure of the premises.³⁶

§ 161. **The right of a tenant at will to recover damages for an injury to the land.** By virtue of the well-established rule that any person having an interest in and a proprietary right to the possession of land may recover damages for an injury to his interest and right, a tenant at will may recover for a trespass on the land or for an eviction by a stranger, or for any conduct on the part of another which prevents him from having the full use and enjoyment of the land according to the amount and character of his right. The tenant at will has such an interest as will enable him to maintain an action of trespass against any person who interferes with his present possession and enjoyment of the land and an action of trespass on the case or some similar action in those states which have adopted the modern system of code procedure against any person who injures him in his possession and enjoyment by maintaining a nuisance.³⁷ And in one case it was held that a tenant at will may maintain trespass even against his own landlord where the latter, before the lease had been legally determined,

³⁶ *Pinhorn v. Souster*, 8 Exch. (Mass.) 135; *Hilburn v. Fogg*, 99 765; *Jones v. Clark*, Hard. 47; Mass. 11; *Bulwer v. Bulwer*, 2 B. Little v. Pallister, 4 Me. 209. & Ad. 470.

³⁷ *Foley v. Wyeth*, 2 Allen

had entered upon the premises and by his conduct caused damage to the personal property of the tenant.³⁸ Where a stranger cuts timber on land which is occupied by a tenant at will, the tenant at will as well as the owner of the reversion may recover damages according to their respective interests in the land.³⁹ So an action for damages for the destruction of uncut grass may be maintained by a tenant at will against a railroad whose negligence⁴⁰ caused the damage. Hence where grass growing on land which is occupied by one as a tenant at will is burned by reason of the negligence of a railroad company the tenant at will may recover for the same though for any permanent injury to the freehold the owner only could recover. The measure of the tenant's damages will be the difference between the usable value of the land to him before and after the grass was burned, down to the time of the trial.⁴¹

³⁸ *Foley v. Wyeth*, 2 Allen (Mass.) 135. "A tenant at will has an estate, which must first be terminated, before he will cease to have a right to continue in possession. Such termination may be brought about by his surrendering his tenancy, or by any act inconsistent therewith (1 Cruise, 273); or by the decease of either party (4 Com. Dig. Estates, H. 7); or by making a lease to another (Co. Litt. 57a); or by giving no-

tice in writing for the purpose, by either party, thirty days at least having elapsed thereafter." *Wheeler v. Wood*, 25 Me. 287.

³⁹ 2 Coke on Lit. 57a. See, also, *Hayward v. Sedgely*, 31 Am. Dec. 64; *Brown v. Bates*, Brayton (Vt.) 230.

⁴⁰ *St. Louis, etc., R. Co. v. Hall*, 71 Ark. 302, 74 S. W. Rep. 293.

⁴¹ *St. Louis, etc., Co. v. Hall*, 71 Ark. 302, 74 S. W. Rep. 293.

CHAPTER VIII.

TENANCY AT SUFFERANCE.

- § 162. The definition of a tenancy at sufferance.
- 163. A tenancy at sufferance arising on the termination of a tenancy at will.
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§ 162. **The definition of a tenancy at sufferance.** A tenancy at sufferance is one which is created by the wrongful holding over and remaking in possession of a tenant whose original entrance upon the land was lawful. The word wrongful when used in this connection merely means that the holding over is without any right founded on contract or other legal basis. It is nearly equivalent to an illegal holding over. Thus, a tenant at sufferance has been defined to be one who had first come in by a lawful demise but who after his estate is at end wrongfully or without the consent of the landlord holds over.¹ This estate is not the result of contract. It is created solely by the delay or forbearance of the landlord in not ousting the tenant after the expiration of the tenancy. It is the most insecure and most insignificant of all tenures. The tenant at sufferance differs in very little from a trespasser. The one fact that distinguishes him from a trespasser is that his original entrance was lawful while the original entrance of the trespasser is unlawful and he is a wrongdoer from the beginning. Strictly speaking tenancy

¹ Co. Litt. 57b; 4 Com. Dig. Estates, 1.

by sufferance is a mere fiction of law for there can be no true tenancy without a contract which involves the assent express or implied of the landlord to the possession of the tenant. The tenancy at sufferance was merely a device of the early common law judges to prevent the creation and running of adverse possession by the tenant holding over. After the expiration of his term the tenant was in fact a mere trespasser or intruder and a tenancy at sufferance was created to prevent the intruder from disputing the landlord's title and holding adversely. And aside from all this the tenant holding over could not be regarded as a trespasser until the landlord actually entered upon possession of the premises as the tenant's original entry had been lawful though his holding over was unlawful.²

§ 163. **A tenancy at sufferance arising on the termination of a tenancy at will.** It is a general rule that on the termination of a tenancy at will the tenant if he remains in possession be-

² So much of law depends upon accurate definitions that it may be well to consider carefully the following, as well as all definitions: "A tenant at sufferance is one who comes into possession of land by lawful title, but who holds over by wrong after the termination of his term. *Fielder v. Childs*, 73 Ala. 567, 577; *Godfrey v. Walker*, 42 Ga. 562, 574; *Hanson v. Johnson*, 62 Md. 25, 29, 50 Am. Rep. 199; *Kellogg v. Kellogg*, 6 Barb. 116, 130; *Rowan v. Lytle*, 11 Wend. (N. Y.) 616, 618; *Jackson v. Cairns*, 20 Johns. (N. Y.) 301, 305; *Emerson v. Emerson* (Tex.), 35 S. W. Rep. 425, 426. When a tenant has come rightfully into possession of land by permission of the owner and continues to occupy the same after the time for which, by such permission, he has a right to hold the same, he is said to be a tenant at sufferance. In the language of the elementary writers he is one who comes in by right and holds over

without right." He holds without right and yet is not a trespasser. *Bright v. McQuat*, 40 Ind. 521, 525. And again, a tenant at sufferance is one who entered by a lawful demise or title, and after that has ceased wrongfully continues in possession without the assent or dissent of the person next entitled. *Willis v. Harrell*, 118 Ga. 906, 45 S. E. Rep. 794, 795. So tenancy by sufferance is a tenancy of such a nature that there is by necessary implication an absence of any contractual relation between the owner and the tenant, and so if, during such tenancy, there be any express permission or assent given by the owner, the tenancy becomes one at will. *Willis v. Moore*, 59 Tex. 628, 637, 46 Am. Rep. 284. So it has been said that an estate at sufferance is an estate created not by the consent but by the laches of the owner. *Rowan v. Lytle*, 11 Wend. (N. Y.) 616, 618.

comes a tenant at sufferance, in the absence of an agreement creating a tenancy of a different character.³ It is not material for what reason the tenancy at will is determined so long as a new lease is not entered into, or the premises are not surrendered to and accepted by the landlord. Thus on the termination of a tenancy at will by the death of the lessor the tenant at will becomes a tenant at sufferance of the lessor's heirs.⁴ So, also, in case a tenancy at will is terminated by a demise for years given by the landlord to a stranger the former tenant at will at once becomes a tenant at sufferance.⁵ Where land which has been leased to a tenant at will is sold under an execution against the lessor the tenancy at will is *ipso facto* at once terminated. The tenant at will of the former owner is thereafter a tenant at sufferance of the purchaser at the execution sale, being made so by the sale. The purchaser or his lessee may thereafter treat the tenant as a tenant at sufferance and may after notice, when it is required by a statute, recover possession.⁶ So, too, a voluntary sale and conveyance of the premises by the landlord terminating the tenancy at will converts the tenant at will into a tenant at sufferance of the vendee,⁷ without any attornment or action on the part either of vendee or vendor.

§ 164. **A tenancy at sufferance by holding over.** A person who, being a tenant at will or for a term of years, holds over after the expiration of his term in the absence of proof that the

³ Doe v. Turner, 7 M. & W. 226, 9 M. W. 643; Esty v. Baker, 50 Me. 325, 79 Am. Dec. 616; Benedict v. Morse, 10 Met. (Mass.) 223; Keay v. Goodwin, 16 Mass. 1; Rising v. Stannard, 17 Mass. 282.

⁴ Reed v. Reed, 48 Me. 688; Knight v. Quigley, 2 Camp. 505; Co. Litt. 57b.

⁵ Hildreth v. Conant, 10 Met. (Mass.) 298. A verbal agreement by the owner of land that a person is to occupy it while he lives without paying rent makes the occupant a tenant at will, and he becomes a tenant at sufferance at once where the owner executes a lease of the premises for a term to another. Hooton v. Holt, 139

Mass. 54, 29 N. E. Rep. 221; Dillon v. Brown, 11 Gray (Mass.) 179.

⁶ Marsters v. Cling, 163 Mass. 477, 40 N. E. Rep. 763, also holding that under the statute a forcible entry or detainer by the tenant need not be shown, nor need it be shown that the occupant ever held of, or attorned to, the new owner. See, also, Lash v. Ames, 171 Mass. 487, 50 N. E. Rep. 996.

⁷ Winter v. Stevens, 9 Allen (Mass.) 526; Lash v. Ames, 171 Mass. 487, 50 N. E. Rep. 996; Howard v. Merriam, 5 Cush. (Mass.) 563, 574; Dallas v. Pool, 3 Met. (Mass.) 350.

landlord has consented to such holding over, is a mere tenant at sufferance.⁸ So, the tenant who holds over after the termination of his lease under an agreement with a person who had no authority to permit him to do so, is a tenant at sufferance. Thus, for example, a person who, on the termination of his lease, goes to one whom he supposes to be the agent of his landlord and this latter person states he may continue in possession until a lease can be arranged for with the landlord, is a tenant at sufferance. So, a tenant for the life of another,⁹ or the lessee for a term of years of a tenant for life who remains in possession after the death of the person who is his lessor becomes a tenant at sufferance.¹⁰ So, generally a tenant for years of a tenant for life, who, without the consent of the remainderman holds over after the termination by death of his term,¹¹ or the tenant who continues in possession after the termination of the lessor's estate¹² becomes thereby a tenant at sufferance.¹³ But the general rule that the tenant holding over after the termination of his estate is thereby a tenant at sufferance is recognized only where the parties are themselves silent. The presumption that the tenant holding over is holding by sufferance may be rebutted though the burden of proof to do so is upon the tenant holding over. He may show that the landlord has so acted or has so spoken that the tenancy

⁸ *Hauxhurst v. Lobree*, 38 Cal. 563; *Sutton v. Hiram Lodge*, 83 Ga. 770, 10 S. E. Rep. 585, 6 L. R. A. 703; *Brown v. Smith*, 83 Ill. 291; *Wheeler v. Wood*, 25 Me. 287; *Keay v. Goodwin*, 16 Mass. 1; *Rising v. Stannard*, 17 Mass. 282; *Finney's Trustees v. City of St. Louis*, 39 Mo. 177; *Russell v. Fabyan*, 34 N. H. 218; *Livingston v. Tanner*, 14 N. Y. 64; *Jackson v. McLeod*, 12 Johns. (N. Y.) 182; *Worthington v. Globe Rolling Mill*, 9 Am. Law Rec. 693, 6 Wkly. Law Bul. 235, 6 Ohio Dec. 1038; *Williams v. Ladew*, 171 Pa. St. 369, 33 Atl. Rep. 329, 37 W. N. C. 100; *Fitzpatrick v. Childs*, 2 Brewst. (Pa.) 365, 23 Leg. Int. 197, 6 Phila. 135; *McNamara v. O'Brien*, 2 Wyo. 447.

⁹ *Allen v. Hill*, Cro. Eliz. 238; Co. Litt. 57b; Comyns' Dig. "Estates," I.

¹⁰ Co. Litt. 57b. And see *Shields v. Atkins*, 3 Atk. 560, 562.

¹¹ *Roe v. Ward*, 1 H. Bl. 96, 99. See *Guthman v. Vallery*, 51 Neb. 824, 71 N. W. Rep. 734; *Tarry v. Tarry*, 14 N. Y. 430, 433; Co. Litt. 57b.

¹² *Simkin v. Ashurst*, 1 Cr. M. & R. 261, 4 Tyr. 781.

¹³ The lessee of the tenant in dower of by the curtesy who holds over without the consent of the remainderman after the death of his lessor is a tenant at sufferance. *Miller v. Mainwaring*, Cro. Car. 397; *Guthman v. Vallery*, 51 Neb. 824, 71 N. W. Rep. 734.

at sufferance was presumed never to have existed, or that it has been converted into some other tenancy.¹⁴ The mere silence of the landlord for a short time after the expiration of the term, while the tenant is holding over is not enough alone to create any presumption that the tenant is anything else but a tenant at sufferance. The presumption that the tenant holding over is a tenant at sufferance implies or requires that there shall be no existing agreement or understanding between the parties executed or implied after the holding has commenced. If on the facts it appears that the holding over was with the consent of the landlord, shown either by his conduct or by his language, or by such a character or degree of silence in connection with the conduct of the tenant, as will in equity and fairness estop the landlord to assert that the tenant is a trespasser, the tenant will be thereafter regarded as a tenant at will and not as a tenant at sufferance and the terms of the prior lease may then be considered in relation to the new tenancy.¹⁵

§ 165. **The grantor in possession after the delivery of his deed.** It has been held in a few cases that a grantor of real property who, with the consent of the grantee, continues in the possession of the property which he has conveyed after the delivery of his deed is a tenant at will of the grantee.¹⁶ The grantor is only a tenant at will where he holds over after the conveyance with the grantee's consent. Where no consent is shown, either expressly or arising by necessary implication, the grantor in possession is a mere intruder. In most cases the grantee must resort to an action of ejectment to remove him from the premises. In every case it is clear that the relationship of landlord and tenant does not exist between grantee and grantor where the latter holds over without the consent of the former, though it has been held in one or two cases that the grantor who agrees to deliver the premises on a certain date and continues in possession after that date has expired without the consent of the grantee is

¹⁴ *Moore v. Smith*, 56 N. J. Law, 446, 448, 29 Atl. Rep. 159.

¹⁵ A purchaser who enters on the premises under an agreement for the sale of leasehold premises which is to be paid in instalments, with a proviso that in the event of a default in the payment

of any instalment all instalments shall be forfeited and the vendor shall not be compelled to convey, is a mere tenant at sufferance after default. *Doe d. Moore v. Lawder*, 1 Stark. 308.

¹⁶ *Currier v. Earl*, 13 Me. 216; *Bennett v. Robinson*, 27 Mich. 26.

a tenant at sufferance and that any person to whom he has leased the premises while he possessed the right to remain in them who holds over after the grantor's right is terminated is a tenant at sufferance of the grantee.¹⁷ And it has also been held that an equitable owner of land who sells the land and thereafter procures the owner of the legal title to execute a conveyance to the person to whom he has sold it is merely a tenant at sufferance of the vendor, where without any agreement authorizing him to remain, he continues in possession of the land after his sale and conveyance.¹⁸ In the absence of proof to the contrary a vendor of land who continues in possession after he has delivered a deed to his vendee will be presumed to do so without the consent of the vendee. From this presumption of non-consent the further inference is drawn in some cases that he is a tenant at sufferance. Clearly the object of the latter presumption is to furnish the vendee with a ready and speedy remedy to obtain the possession of the land in place of the tedious and expensive remedy by ejectment which he would be put to if the intruder were not a tenant at sufferance. The presumption of the vendee's non-consent may always be rebutted by competent proof, and, if it appears from the proof, that the vendee consented to the holding over by the vendor, his holding over ceases to be wrongful, and he is no longer a tenant at sufferance and may be regarded as a tenant at will.¹⁹

§ 166. **A servant or agent in the possession of his employer's land after the contract is at an end.** A servant or agent of the owner of land who as a part of the compensation for his services rendered to the owner is permitted by the owner to occupy premises free of rent on the termination of the contract of agency or employment becomes a tenant at sufferance of the master.²⁰ The general rule is that the holding over of the agent or servant must be without the consent of the master. The termination of the

¹⁷ Hyatt v. Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Wood v. Hyatt, 4 Johns. (N. Y.) 313; Bennett v. Robinson, 27 Mich. 26, 30. Also holding that the fact that the grantee has entered into a contract to reconvey in the future on certain contingencies does not alter the rule.

¹⁸ Work v. Brayton, 5 Ind. 396, 399.

¹⁹ Bennett v. Robinson, 27 Mich. 26, 30; Wolcott v. Hamilton, 61 Vt. 79, 17 Atl. Rep. 39.

²⁰ Eichengreen v. Appel, 44 Ill. App. 19; Bristol v. Burr, 120 N. Y. 427, 31 N. Y. S. R. 566, affirming, 12 N. Y. St. Rep. 638.

contract instantly determines all relations between the parties, and the agent or servant's possession from that minute is wrongful. He is not a trespasser, however, because his original entry was lawful. While the contract of hiring exists a servant who lives upon his master's land may or may not be a tenant of the master. The fact that he occupies premises for the necessary performance of his duty for his employer does not make him a tenant. Nevertheless, if he continues after his discharge from the master's service to occupy the premises he must be regarded as a tenant at sufferance for he can under no circumstances be treated as a trespasser because his original entry was lawful.²¹

§ 167. **The mortgagor in possession after sale or condition broken.** A mortgagor who is in possession of the mortgaged premises after foreclosure and after the expiration of the period of redemption,²² or after condition broken^{22a} or who continues in possession after a sale of the mortgaged premises made under a power of sale in the mortgage²³ is a tenant at sufferance of the mortgagee or of the mortgagee's assignee before sale and after the sale he is a tenant at sufferance of the purchaser.²⁴

²¹ *School District No. 11 v. Bat-sche*, 106 Mich. 336, 64 N. W. Rep. 196, 29 L. R. A. 576. It was contended by the defendant's counsel that in order to have a tenancy grow into one by sufferance it must have been originally created by an agreement for one of the parties, and that as no agreement for a tenancy ever existed the relation cannot arise. But it was held that a person in possession of land lawfully who holds over without right becomes a tenant at sufferance if the owner suffers him to remain in possession a sufficient length of time to imply an intentional acquiescence in the occupancy, and it is not necessary that the previous holding be that of a tenant.

²² *Tucker v. Keeler*, 4 Vt. 161.

^{22a} *Jackson v. Warren*, 32 Ill. 31.

²³ *Kinsley v. Ames*, 2 Met. (Mass.) 29. See, also, *Johnson v.*

Donaldson, 17 R. I. 107, 20 Atl. 242.

²⁴ *Luchs v. Jones*, 1 MacArthur (D. C.) 345; *Stedman v. Gassett*, 18 Vt. 346, 351; *Bodwell Granite Co. v. Lane*, 83 Me. 168, 21 Atl. Rep. 829; *Doe v. Giles*, 5 Bing. 421; *Doe v. Maisey*, 8 Bar. & Cres. 767. "We find from the deed between the parties that the possession of his estate is secured to him until a certain day, and that if he does not redeem his pledge by that day the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee. And there is no more occasion for his requiring that the estate should be delivered up to him, before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor

So where a woman and her husband enter into the possession of his land, which he mortgages and then absconds, leaving her in possession of the land and subsequently he conveyed it to a third person and it is ultimately sold in foreclosure she, after the sale in foreclosure, is merely a tenant at sufferance of the purchaser.²⁵

§ 168. When an under tenant becomes a tenant at sufferance.

An under tenant, after the termination of his lessor's tenancy is a tenant at sufferance of the original lessor in the absence of proof that he has been accepted by the latter as a tenant. Having come into the possession lawfully by and under his lease the undertenant is not a trespasser as against the original lessor though the entry of the latter without notice is not wrongful.²⁶ An under tenant who is in possession at the determination of the original lease and is permitted by the landlord to hold over, is *quasi* a tenant at sufferance; and the mere fact of his continued occupation, coupled with the payment of rent to the original lessor for such time of occupation does not raise the presumption of a new demise to him for years by the original landlord unless there is some evidence to show an agreement for a demise for a term of years.²⁷ A purchaser of land belonging to a married woman under a deed which is signed by both husband and wife, but which is invalid as to the wife, though passing the husband's interest takes only the latter's interest. On the death of the husband he becomes a tenant at sufferance of the wife or of her heirs if she has died before the husband. If the husband shall survive the wife his estate by the curtesy passes by the deed subject to the rights of her heirs. But in no case is the occupation

who has covenanted that the mortgagor may enter on a certain day, is precisely the same." By Best, C. J., in *Doe d. Fisher v. Giles*, 5 Bing. 421, on page 427.

²⁵ *Taylor v. O'Brien*, 19 R. I. 429, 34 Atl. Rep. 739. In this case it was held that in order that there should be a tenancy at sufferance it is by no means necessary that there should have been a prior tenancy between the parties. *Kenney v. Sweeney*, 14 R. I. 581; *Payton v. Sherburne*, 15 R.

I. 215, 2 Atl. Rep. 300; *Johnson v. Donaldson*, 17 R. I. 107, 20 Atl. Rep. 242.

²⁶ *Evans v. Reed*, 5 Gray (Mass.) 308, 309; *Brown v. Smith*, 83 Ill. 291; *Wheeler v. Wood*, 25 Me. 287. See, also, *Meier v. Thiemann*, 15 Mo. App. 207.

²⁷ *Simkin v. Ashurst*, 1 C. M. & R. 261, 4 Tyr. 781. As to the acceptance of rent and its effect. see *Evans v. Reed*, 5 Gray (Mass.) 308, 309.

of the purchaser adverse to the wife or to her heirs after her death and when the reversion vests in her or in them they may assert their rights against the purchaser and may treat him as their tenant at sufferance.²⁸

§ 169. **Necessity for notice to quit.** A tenancy by sufferance may be terminated at any time by the entry upon the land of the landlord without any previous notice or demand. In the absence of a statute requiring the giving of a notice to quit the tenant at sufferance is not entitled to such notice nor even to the demand of possession.²⁹ Thus, as is elsewhere explained the landlord may in the absence of a statute prohibiting it enter upon the land and oust the tenant using no more force than is necessary. In some of the states of the United States statutory provisions are made for a notice to quit in the case of the tenancy at sufferance. These statutes generally specify the period for the notice. They should be consulted as to the procedure. Under a statute which requires notice to quit in writing by the owner in the case of a tenancy at sufferance a mortgagor who has sold his equity and has thereafter purchased the property at the foreclosure sale must give notice before he can maintain ejectment against a tenant by sufferance.³⁰

²⁸ Griffin v. Sheffield, 38 Miss. 359, 390; Day v. Cochran, 24 Miss. 261.

²⁹ Joy v. McKay, 70 Cal. 445, 11 Pac. Rep. 763; McLeran v. Benton, 73 Cal. 329, 14 Pac. Rep. 879; Hauxhurst v. Lobree, 38 Cal. 563; Lee Chuck v. Quan Wo Chong, 91 Cal. 593, 28 Pac. Rep. 45; Willis v. Harrell, 118 Ga. 906, 45 S. E. Rep. 794; Petty v. Malier, 10 B. Mon. (Ky.) 591; Robie v. Smith, 21 Me. 114; Reed v. Reed, 48 Me. 388; Clapp v. Plain, 18 Me. 264; Stockwell v. Marks, 17 Me. 455, 461; Wamsganz v. Wolff, 86 Mo. App. 206; Howard v. Carpenter, 22 Md. 10; Hollis v. Pool, 3 Met. (Mass.) 350; Creech v. Crockett, 5 Cush. (Mass.) 133; Evans v. Reed, 5 Gray (Mass.) 308; Hooton

v. Holt, 139 Mass. 54, 29 N. E. Rep. 221; Kingsley v. Ames, 2 Met. (Mass.) 29; Decker v. Adams, 12 N. J. Law, 99; Moore v. Smith, 56 N. J. Law, 446, 449, 29 Atl. Rep. 159; Livingstone v. Tanner, 14 N. Y. 64; Torrey v. Torrey, 14 N. Y. 480; Anderson v. Brewster, 44 Ohio St. 576, 9 N. E. Rep. 683; Wallis v. Delmar, 21 L. J. Exch. 276; Doe d. Bennett v. Turner, 7 Mee. & Wel. 226, 235; Doe d. Roby v. Maisey, 6 B. & C. 767; Doe d. Moore v. Lawder, 1 Stark. 308; Thunder v. Belcher, 3 East, 450.

³⁰ Johnson v. Donaldson, 17 R. I. 107, 20 Atl. Rep. 242. As to the sufficiency of a notice in Wisconsin, see Minard v. Burtis, 83 Wis. 267, 53 N. W. 509.

§ 170. **Right of a tenant at sufferance to lease.** A tenant at sufferance has no interest which will support a lease by him except as against himself.³¹ In other words one tenant at sufferance cannot create another tenant at sufferance for this tenancy is usually the result of the operation of rules of law rather than of the acts of the parties. If he shall attempt to make a lease his so-called tenant has no other or better right against the original landlord than the tenant himself.³²

§ 171. **The liability of a tenant at sufferance to pay rent.** At the common law rent as such is not recoverable by the landlord from tenants at sufferance "because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding estate."³³ This reason for the rule is more fanciful than substantial. The true reason for the non-liability of the tenant at sufferance for rent may be found in the absolute and utter absence of any privity of contract between the land owner and the tenant at sufferance for, where he is strictly a tenant at sufferance, he always holds without the consent of the landlord and often he may claim to hold adversely. Hence even for use and occupation no action will lie. An illustration of such a holding by a tenant at sufferance will be found in the case of a vendor who is holding over after the delivery of a conveyance to the vendee, or a tenant at will holding over after he has denied his lessor's title. In neither case is there a trespass for the entry is lawful but in both cases no rent can be demanded for there is no privity, nor can an action for use and occupation be sustained as the relation of landlord and tenant does not exist. If, however, a tenant at sufferance is permitted to continue in the occupation of the premises by the consent of the landlord, either express or implied; he is thereafter liable for the rent which may be recovered at common law by means of an action

³¹ *Thunder v. Belcher*, 3 East, 450; *Shopland v. Ryder*, Cro. Jac. 55.

³² *Thunder v. Belcher*, 3 East, 450.

³³ 1 Cruise, Dig. tit. 9, c. 2, § 6; 4 Kent, Com. 116; 2 Black. Com. 151. See, as sustaining the text, *Smith v. Houston*, 16 Ala. 111; *McLeran v. Benton*, 73 Cal. 329,

14 Pac. Rep. 879, 883; *Dixon v. Haley*, 16 Ill. 145; *Emmons v. Scudder*, 115 Mass. 367, 371; *Flood v. Flood*, 1 Allen (Mass.) 217; *Delano v. Montague*, 4 Cush. (Mass.) 42, 45; *Merrill v. Bullock*, 105 Mass. 486, 490; *Poole v. Engelcke*, 61 N. J. L. 124, 125, 38 Atl. Rep. 823.

based on the fiction of a implied promise on the part of the tenant to pay what the use and occupation of the premises are reasonably worth to him.³⁴ Some cases have gone further than this in holding that a tenant at sufferance after the landlord's demand for, and the tenant's refusal of possession becomes liable for the rent or, at least, for the reasonable value of the use and occupation of the premises,³⁵ thus creating a liability where there is no possibility of showing an assent by the landlord either express or implied to the holding over of the tenant at sufferance. In Massachusetts it has been provided by statute that "tenants at sufferance in possession of lands or tenements shall be liable to pay rent therefor for such time as they may occupy or detain the same," and that "such rent may be recovered in an action of contract."³⁶ This statute does not define to whom a tenant at sufferance shall be liable to pay rent, or by whom he may be sued. The statute was clearly intended to confer an action in contract for the value of the use and occupation wherever the relationship of landlord and tenant by a lease for years or at will, or by permission or assent, express or implied had existed between the parties or between the defendant and any person with whom the plaintiff was in privity of estate, though the plaintiff might not, but for the statute, have been in sufficient privity with the defendant to maintain the action. The statute was not meant to make an occupant of land liable to an action of contract for use and occupation by a person whose title he had never admitted, either expressly or by implication but had always denied and whose tenant he had never been in any sense.³⁷

³⁴ *Merrill v. Bullock*, 105 Mass. 486, 490; *Keay v. Godwin*, 16 Mass. 1, 4; *Gould v. Thompson*, 4 Met. (Mass.) 224, 228; *Harding v. Crothorn*, 1 Esp. 57; *ibbs v. Richardson*, 9 Ad. & El. 849, 1 P. & D. 618; *Christy v. Tanered*, 7 M. & W. 127, 9 M. & W. 438, 12 M. & W. 316; *Bayley v. Bradley*, 5 Com. Bench, 56.

³⁵ *Smith v. Singleton*, 71 Ga. 68, 71; *Jackson d. Livingston v. Niven*, 10 Johns. (N. Y.) 335; *Right d. Lewis v. Beard*, 13 East, 210.

³⁶ Mass. Rev. St. § 23, and General Sts. c. 90, §§ 25, 26.

³⁷ *Merrill v. Bullock*, 105 Mass. 486, 492. See, also, *Bunton v. Richardson*, 10 Allen (Mass.) 260; *Knowles v. Hull*, 99 Mass. 562. Where a tenancy at will is terminated by the execution of a lease of the premises to a stranger, by which the tenant at will becomes a tenant at sufferance, the statutory liability of the tenant at sufferance is to the new lessee alone, and no judgment in favor of the original lessor and the lessee

§ 172. **Action of trespass by the landlord against the tenant at sufferance.** The possession of the tenant at sufferance being wrongful and, inasmuch as he has no interest as against the landlord, or even as against a stranger, except so far as possession is conferred by the delay of the landlord in ousting him, the landlord may under some circumstances, at the common law and in the absence of a statute requiring judicial proceedings to be brought, enter upon the land and eject the tenant by force provided he uses no more force than is necessary.³⁸ He will not be liable in damages to the tenant at sufferance unless he uses excessive or unnecessary force. Thus, a landlord who, after notice to quit, enters the premises, while the tenant at sufferance was temporarily absent, by forcing the door open and places the tenant's chattels outside and re-fastens the door is not liable to the tenant at sufferance.³⁹ And where the tenant at sufferance after being thus ejected re-enters and re-occupies the premises, he becomes thereby a trespasser from the day of his re-entry. The landlord cannot bring an action of trespass against his tenant at sufferance until he shall by an actual entry upon the land or by some other positive or public act declare his possession to be wrongful and adverse. For the original entry of the tenant at sufferance is lawful and hence he cannot be a trespasser while he continues to hold possession under his original entry. Thus, an action of trespass cannot be maintained by the landlord against the tenant at will who becomes a tenant at sufferance by holding over after his tenancy at will is determined by the occurrence of an event over which the tenant at will had no con-

as joint plaintiffs can be rendered. *Cofran v. Shepard*, 148 Mass. 582, 20 N. E. Rep. 181. In New Jersey, by statute, a landlord may recover from the tenant at sufferance a "reasonable satisfaction for the lands, tenements and hereditaments held or occupied by the defendant," and when there was a parol demise or agreement reserving a certain rent, that rent is the exclusive measure of the reasonable satisfaction to be obtained. *Poole v. Engelcke*, 61 N. J. Law, 124, 126, 38 Atl. Rep. 323. In Kan-

sas the common-law rule has been abrogated by Gen. St. 1901, § 3864. *Martin v. Allen*, 67 Kan. 758, 74 Pac. Rep. 249.

³⁸ *Sampson v. Henry*, 11 Pick. (Mass.) 379; *Jackson d. Stansbury v. Farmer*, 9 Wend. (N. Y.) 20; *Currier v. Gale*, 9 Allen (Mass.) 522; *Hillary v. Gray*, 6 Car. & P. 284; *Newton v. Harland*, 1 M. & G. 644; *Taunton v. Caspar*, 7 T. R. 431; *Taylor v. Cole*, 3 T. R. 292.

³⁹ *Mussey v. Scott*, 32 Vt. 82.

trol and of which he was perhaps absolutely ignorant, at the time it happened, as, for example, the death of his landlord, or a lease of the premises by his landlord to another.⁴⁰ The estate at will is by the occurrence of this event ended, but the tenant at will is not thereafter a trespasser for the reason that his original entry and possession were lawful. Having entered by a lawful title, he will be presumed to continue to hold under the lawful title by which he entered, and in subordination to the title of his landlord until the landlord, by some unquestionable act or language, expressly disaffirms the relationship which he bears to the tenant.⁴¹

⁴⁰ In *Rising v. Stannard*, 17 Mass. 282, on page 286, the court said: "It may be fairly determined from these principles that when an estate at will is determined by an event not within the knowledge of the tenant his holding over will not amount to a trespass. Suppose, for example, that the estate is determined by the death of the lessor in a distant country, or by his conveyance of the land, of which the tenant can by no possibility have notice at the time of such death or conveyance; it would hardly be contended that the tenant by holding over becomes a trespasser. For, as the law allows him a reasonable time to remove after notice given him to quit, he cannot be bound to quit without notice."

⁴¹ *Rising v. Stannard*, 17 Mass. 282; Coke, Inst. 57; 2 Black. Com. 150. In the case of the sale of a house occupied by the tenant at sufferance the vendee may remove the goods of the tenant which he finds in the house after giving him reasonable notice to quit, as required by statute, and no time is specified. The vendee whose offer to take the goods wherever the tenant wished is refused by the tenant who neglects to tell him anything as to how they shall be disposed of may take them and store them to the order of the tenant. By this action he does not render himself liable for the conversion of the chattels. *Lash v. Ames*, 171 Mass. 487, 50 N. E. Rep. 996.

CHAPTER IX.

WHAT CONTRACTS ARE LEASES.

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§ 173. **The definition of a lease.** Many attempts more or less successful have been made to define a lease. Some of the definitions are too broad; others are too narrow. Considering carefully all the elements which enter into the relationship of landlord and tenant we may safely define a lease as a contract by which the owner of lands and tenements, surrenders their possession, occupation, and enjoyment for all purposes to another person for life or for a fixed and certain term of years or during the pleasure of the parties in return for a recompense in money, goods or services or some other valid consideration to be rendered by the persons who, by the contract, become entitled to the possession, with a reversion in the owner after the expiration of the lease. Other definitions will be found in the notes. Leases are divided into leases *in presenti* where a present interest passes and leases in reversion.¹

¹ A lease is a contract for the tenements on the one side and a possession and profits of lands and recompense of rent or other in-

§ 174. Leases in reversion—*Interesse termini*. All leases which are meant to commence at a future day are leases in reversion. Where the term is to commence at a future date and no present right of possession is conferred upon the tenant, it is a lease in reversion and the estate which is meant to be created by the lease is imperfect and incomplete and becomes perfect and complete only when the date arrives on which the term is to begin. Hence a lease for a term to begin in the future and a lease in reversion are synonymous. Both are leases which are to begin after the termination of another and prior interest in the premises then existing in another person.² Leases in reversion are unquestionably valid. But under such a lease the lessee merely acquires an *interesse termini* until the arrival of the date when his estate is to commence in point of time. A lessor granting a lease in reversion does not part with the reversion so as to prevent him from distraining for rent which may become due under the prior lease after the lease in reversion has been executed.³ For a grant of a lease in reversion does not convey to the lessee any right to rent due the lessor under a prior lease. Where in a lease which is to take effect after the termination of an existing lease, the latter is recited, and the future lease is made to commence after such prior lease has terminated, the

come on the other; or else it is a conveyance of lands and tenements to a person for life or years, or at will, in consideration of a return of rent or other recompense. 4 Cruise's Dig. 115; 4 Bac. Abr. 1, tit. "Leases;" 2 Bl. Com. 317; Shep. Touchstone, c. 14. "A lease doth properly signify a demise or letting of land, rent, common, or any hereditament, unto another for a lesser time than he that doth let it hath in it. * * * This word also is sometimes, though improperly, applied to the estate, *i. e.*, the title, time, or interest the lessee hath to the thing demised, and then it is rather referred to the thing taken or demised and the interest of the taker therein." Shep. Touch. 265.

A lease is defined to be a species of contract for the possession and profits of lands and tenements either for life or during the pleasure of the parties; a contract by which one person divests himself of, and another takes possession of, lands or chattels for a term, whether long or short; a conveyance of any lands or tenements made for life or at will, but always for a less time than the lessor has in the premises. *Badger Lumber Co. v. Malone*, 8 Kan. App. 121, 54 Pac. Rep. 692.

² *Allen v. Calvert*, 2 East, 376, 383; *Goodtitle v. Finucane*, 2 Doug. 565.

³ *Smith v. Day*, 2 M. & Wel. 684, 700.

lease in reversion will take effect at once after the termination of the prior lease, whatever the cause of the termination of the prior lease. Hence, under such a situation of affairs, the future lease takes effect at once upon the termination of the prior lease by efflux of time, forfeiture or surrender, although in the *habendum* clause of the future lease it is expressly made to commence ten or twenty years from the expiration of the earlier lease. On the other hand, if the lease in reversion is made to commence say ten or twenty years from a future date, which is also the date of the expiration of the earlier lease, the future lease will only commence after the earlier lease has expired or would have expired by efflux of time, though in fact it has sooner expired by another cause.⁴ At the common law an estate of freehold could not be made to commence *in futuro* without some prior estate of freehold to support it. Hence a lease for lives could not be made in reversion unless it was to begin after another estate in freehold granted by the same instrument. There was never any objection at the common law to creating an estate for a term of years to commence *in futuro* as such an estate was looked upon as a mere chattel interest for which livery of seizin was not required. In modern times when the necessity for livery of seizin no longer exists there can be no possible objection to making a lease for life to commence *in futuro*. By giving a lease for a term to commence at a future day, the tenant acquires the right to the possession when the day arrives. In the meantime should the landlord make a lease to one who enters and gives him possession, the tenant may maintain an action for damages.⁶ But a lease *in presenti* possession, to commence in the future, vests a present interest in the term, and the lessee at once becomes responsible for the rent.⁷

§ 175. **Formal and technical language unnecessary.** At the common law the proper and technical words of conveyance to be used in a lease, in order to create a valid interest in a term were, "farm let," "betake," "demise," "grant," or other similar words appropriate to a grant.⁸ It is always advisable in the interests of certainty to employ some such words in the granting clause. But no particular words technical or other-

⁴ Woodhouse's Case, 1 Dyer, 93b;
Wrottesley v. Adams, 2 Dyer, 177b.

⁷ Becar v. Flues, 64 N. Y. 518.

⁸ 4 Coke, Litt. 43b.

⁶ Trull v. Granger, 8 N. Y. 115.

wise, or forms of expression are necessary to constitute a lease. Any language by which the possession and enjoyment of land are granted for a limited time, for a stipulated return, creates a tenancy and is, in effect, though perhaps not in name, a lease. The law will look to the intention of the parties rather than to the form of the instrument. In other words if, from the language employed by the parties, it is clear that they meant that one of them shall part with the possession and enjoyment, and that the other shall, for a consideration, passing from him to the other, or to some third person, enter into possession, it is a lease and the language employed is wholly immaterial.⁹ The form is of no consequence. Nor is it necessary that the word lease shall be used. If the words are in form a license, or covenant and other requisites of a lease are present, the writing is a lease.¹⁰ Thus letters passing between the parties which contain all the language necessary to a letting and hiring of premises¹¹ or a receipt,¹² may constitute a lease. On the other hand, the fact that the parties to a writing call it a lease is not conclusive that the writing is a lease where from the words of the instrument it appears that the parties meant that it should be something else or it was meant for some other purpose.¹³

⁹ *Jackson v. Hughes*, 1 Black. (Ind.) 421; *Munson v. Wray*, 7 Blackf. (Ind.) 403, 404 (receipt); *Waller v. Morgan*, 18 B. Mon. (Ky.) 136, 142; *New York C. & St. L. Ry. Co. v. Randall*, 102 Ind. 453, 456, 26 N. E. Rep. 122; *Pittsburgh, etc., Co. v. Thornburgh*, 98 Ind. 201, 205; *Moshier v. Reding*, 13 Me. 478, 482; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401; *Eastman v. Perkins*, 111 Mass. 30; *Boone v. Stover*, 66 Mo. 430; *Coyne v. Feiner*, 16 N. Y. Supp. 203; *Compton v. Chelsea*, 55 Hun, 609, 8 N. Y. Supp. 622; *Bussman v. Gauster*, 72 Pa. St. 286; *Miller v. McBaier*, 14 S. & R. (Pa.) 385; *Watson v. O'Hern*, 6 Watts. (Pa.) 362, 368; *Pickering v. O'Brien*, 23 Pa. Super. Ct. Rep. 125; *Twiss v. Boehmer*, 39 Oreg. 359, 65 Pac.

Rep. 18; *Maverick v. Lewis*, 3 McCord (S. C.) 211; *Mickle v. Lawrence*, 5 Rand. (Va.) 571; *Mason v. Clifford*, 4 Fed. Rep. 177.

¹⁰ *Moore v. Miller*, 8 Pa. St. 272, 283; *Co. Litt.* 45b.

¹¹ *Culton v. Gilchrist*, 92 Iowa, 718 61 N. W. Rep. 384.

¹² *Munson v. Ray*, 7 Black. (Ind.) 403, 404.

¹³ *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 135 Mo. 173, 36 S. W. Rep. 602. "Where the conveyance of an estate in land subordinate to that of the grantor is made for a valuable consideration and for a definite term, the instrument of conveyance is a lease. Less than this may be a lease; more cannot be required." *New York, etc., Co. v. Randall*, 102 Ind. 453, 456, 26 N.

§ 176. Words proper to create a lease. Words of present demise such as "doth let," "doth demise," "agrees to pay for," "shall enjoy," "hath set" and to "farm let,"¹⁴ "thereby set and let,"¹⁵ "agrees to lease and let,"¹⁶ "agrees to let,"¹⁷ "agrees to lease and let,"¹⁸ "hereby leases and demises,"¹⁹ and the like will generally constitute a lease even though the execution of a formal or future instrument appears to have been intended.²⁰ The test in all cases seems to be whether the parties

E. Rep. 122. In Louisiana a lease differs materially from a *usufruct*. The latter is a species of ownership, usually for life, with an obligation to pay taxes and repairs, and it may be mortgaged or transferred. A lease is a personal right, giving only the use of the premises, without any proprietary interest. *Hoffman v. Laurans*, 18 La. 70. An agreement by a town that, if a person will build a house to be used as a market house for the town, he should have the privilege of using it for a specified number of years, at the end of which it would become the property of the town, is not a lease. No interest in land is conveyed. All that is granted is the right or privilege of keeping this house as a market, in conformity with the town ordinances." *Brookhaven v. Baggett*, 61 Miss. 383, 390.

¹⁴ *Jackson v. Kisselbrack*, 10 Johns. (N. Y.) 336.

¹⁵ *Baxter v. Browne*, 2 W. Bl. 973.

¹⁶ *People v. St. Nicholas Bank*, 3 App. Div. 544, 38 N. Y. Supp. 379, affirmed in 151 N. Y. 592, 45 N. E. Rep. 1129, in which the parties agreed to execute and exchange leases prior to the occupancy of the premises, "such leases to be drawn on, and this agreement being subject to, all the provisions of the blank forms in

use in" the lessor's building, etc. The agreement was held a valid lease, though the formal lease contemplated was never executed.

¹⁷ *Kabley v. Worcester G. L. Co.*, 102 Mass. 392; *Western Boot & Shoe Co. v. Gannon*, 50 Mo. App. 642; *Hallett v. Wylie*, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457.

¹⁸ *Averill v. Taylor*, 8 N. Y. 44; *Hunt v. Comstock*, 15 Wend. (N. Y.) 665, 667.

¹⁹ *Weed v. Crocker*, 13 Gray (Mass.) 219, 224; *Bacon v. Bowdoin*, 322 Pick. (Mass.) 491.

²⁰ *Wright v. Trevezant*, 3 C. & P. 411; *Doe v. Groves*, 15 East, 244; *Baxter v. Brown*, 2 W. Bl. 973; *Hand v. Hall*, L. R. 2 Ex. Div. 355; *Doe v. Benjamin*, 9 Ad. & E. 644; *Fiske v. Ernst*, 62 N. Y. Supp. 429, 96 N. Y. St. Rep. 429; *Ver Steeg v. Becker Moore Paint Co. (Mo.)*, 80 S. W. Rep. 346, 351; *Western Shoe Co. v. Gannon*, 50 Mo. App. 642; *Bradley v. Metropolitan Music Co.*, 89 Minn. 516, 95 N. W. Rep. 458, 459. An agreement that one "herely lets, demises and leases," to have and to hold for a term ending on a certain date at a rent specified in instalments "said rental to begin when the building hereinafter described shall be ready for occupancy," and the other party binds himself to erect a building thereon, is a lease *in presenti* for a

have left anything incomplete, for if not, the agreement may operate as a present demise.²¹ Thus if the owner of the demised premises agrees to make certain alterations and improvements and the intending lessee agrees to take a lease when the premises shall be thus altered and improved, and the term was to begin from the day the improvements were completed, the writing is an agreement for a lease and not a lease, though it contain words of present demise.²² An agreement for a future formal lease may be considered as one circumstance showing intention, though it is never when taken alone conclusive that the writing is merely an agreement. If there are apt words of present demise, an agreement for a further lease will not make the instrument a mere agreement to execute a lease but the agreement for a formal lease will be considered as in the nature of a covenant for further assurances.²³ If, however, there are no

term to begin *in futuro*, the certainty of the commencement of the term being satisfied by the subsequent completion of the building. *Colclough v. Carpeles*, 89 Wis. 239, 61 N. W. Rep. 836. See, also, *St. Louis Brewing Ass'n v. Niederluecke*, 102 Mo. App. 303, 76 S. W. Rep. 645, citing *Doe dem. Phillips v. Benjamin*, 9 A. & E. 644; *Chapman v. Bluck*, 4 Bing. N. C. 187. The words "I agree to let and hereby do let" (*People v. Kelsey*, 38 Barb. (N. Y.) 269; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401, and the words, "A. hath let" are sufficient to create a lease. *Livingston v. Kisselbrock*, 10 Johns. (N. Y.) 336. So it has been held in England that a covenant "to stand seized," where it is made by the owner of land or a covenant of quiet enjoyment (*Pritchard v. Dodd*, 5 B. & Ad. 689), is a lease. For it has been held in England that a covenant of this character accompanied by an entry on the premises to which it relates is a lease. As soon as a covenant is

made and accepted by the lessee he has a right to enter, which on his entry becomes a lease. *Capley v. Hepworth*, 12 Mod. 1; Co. Litt. 37. So the words, "shall have and enjoy," amount to a lease without other words. *Whitlock v. Horton*, Cro. Jac. 91.

²¹ *Kabley v. Worcester G. L. Co.*, 102 Mass. 392, 395; *Doe v. Ries*, 8 Bing. 178. Where an owner of land "agreed to rent or lease" land to a gas company for the storage of materials or to erect a building on it, and at its request cleared the land of timber, it is a lease, though the gas company never used or occupied the land in any way. *Kabley v. Worcester G. L. Co.*, 102 Mass. 392, 395. See, also, *Dunklee v. Webber*, 151 Mass. 408, 24 N. E. Rep. 1082; *Charlton v. Columbia R. E. Co.*, 64 N. J. Eq. 631, 54 Atl. Rep. 444, 447.

²² *Jackson v. Delacroix*, 2 Wend. (N. Y.) 433, 440.

²³ *Bradley v. Metropolitan Music Co.*, 89 Minn. 516, 95 N. W. Rep.

clear, explicit or unequivocal words of present demise, a provision for the execution of a lease in future will usually be regarded as raising a presumption that the parties intended the instrument as an agreement for a lease and not as a lease itself.²⁴ In all cases the fact that the tenant has gone into the possession of the demised premises as a tenant is of great force and effect to show an intention that the contract should be taken as a lease and not as an agreement. It will be difficult, if not impossible, to find a case where words of present demise followed by possession have not been construed as constituting a lease.²⁵ The fact that the building, a portion of which one "agrees to lease," is at that time in process of construction and also that the commencement of the lease is not mentioned at all in the agreement to lease does not necessarily prevent an instrument from being a present demise where such is clearly the intent of the parties. Nor does it alter the situation of affairs under such a contract that the party who agrees to lease had no title when he made the agreement to lease but merely an agreement for a future formal lease to be executed to him when the building should be completed.²⁶

§ 177. **Whether a writing is a lease or an agreement to make a lease.** It is often extremely difficult for the courts to distinguish between a written lease and a writing which is merely an agreement to make a lease. The distinction is always very im-

458, 459; *Jackson v. Kisselbrack*, 10 Johns. (N. Y.) 336, 337, 6 Am. Dec. 341.

²⁴ *Goodtitle v. Way*, 1 T. R. 735; *Doe v. Clare*, 2 T. R. 739; *Doe v. Ashburner*, 5 T. R. 163; *Doe v. Smith*, 6 East, 530. See, also, *Harrison v. Parmer*, 76 Ala. 157, 161; *People ex rel. Norton v. Gillis*, 24 Wend. (N. Y.) 201; *People v. St. Nicholas Bank*, 3 App. Div. 544, 38 N. Y. Supp. 379.

²⁵ *Jackson v. Delacroix*, 2 Wend. (N. Y.) 423, 440. "If the instrument, upon its face, purports to be the contract upon which the occupation is to be enjoyed, and the relations and rights of the par-

ties to be defined, and it contains apt words to operate as a present demise, it will be so construed. Otherwise it will be regarded as an agreement only. Subsequent occupation, like other acts and conduct of the parties to a contract in relation to its subject matter, may aid, upon the question of intention, in the interpretation of their agreement, but they cannot control it against the meaning of the words used nor supply a meaning which the words will not reasonably bear." *McGrath v. Boston*, 103 Mass. 369, 372.

²⁶ *Western Boot & Shoe Co. v. Gannon*, 50 Mo. App. 642.

portant since the consequences of the breach of a lease are very different from the consequences of the breach of an agreement to make a lease.²⁷ The distinction is important for it may happen that a writing which one party supposed to be merely an agreement to make a lease may turn out to be a lease passing an estate in the land by reason of which the other party will escape the obligation of covenants which would have been inserted had both parties to the instrument understood the instrument to have been a lease and not an agreement for one. The distinction is also clearly manifest where we consider that by a lease the lessee acquires an actual interest in the land called an *interesse termini* which upon entry vests a possession in him which he may regain if ousted, by ejectment. Under an agreement for a lease all he has is a cause of action for any damages that he may suffer in the event of the landlord's failure to execute the lease,²⁸ or he may file a bill in equity for a specific performance of the agreement to give a lease.^{28a} Whether an instrument is to be construed as a lease, or as an agreement for one, depends upon the intention of the parties to be collected from the instrument itself, the entry on the subject matter with reference to extrinsic circumstances or the subsequent acts of the parties.²⁹ If the instrument apparently purports to create a right to demand a lease to be executed at some time in the future, it will be presumptively a contract to make a lease and not a lease itself. As is elsewhere pointed out, everything depends upon the intention of the parties which must be gathered from their language as contained in the writing, and construed in the light of the facts and circumstances of the case. If the instrument, while speaking of an intention to lease, leaves something material incomplete and to be arranged in the future as where it leaves the length of the term to be subsequently determined, or fails to fix the precise amount of rent payable, it may be regarded merely as an agreement for a lease. An agreement by which a land owner agrees by parol that he *will lease*

²⁷ Donovan v. P. Schoenhofen Brewing Co., 92 Mo. App. 341.

²⁸ Price v. Williams, 1 Mee. & Wel. 6.

^{28a} Harrison v. Palmer, 76 Ala. 157, 161.

²⁹ Western Boot & Shoe Co. v. Gammon, 50 Mo. App. 642; Doe d. Morgan v. Powell, 8 Scott (N. R.) 687, 7 Man. & G. 980, 14 L. J. C. P. 5, 8 Jur. 1123; S. P. Morgan d. Dowding v. Bissell, 3 Taunt. 65.

another his land for a term at a reasonable rent which is to be subsequently agreed on by the parties: and to be payable in promissory notes to be subsequently executed and delivered, is not a lease but merely an executory agreement to make one.³⁰ So, in a case where an agent has authority "to close a lease" on the part of the lessee and he submits an offer to the prospective lessor who states that he will accept it and directs the agent to prepare a lease and the agent at once informs the party he represents of the acceptance and forthwith prepares a lease which is never executed, the transaction is not a lease but merely an agreement to make one.³¹ So, an oral agreement suggesting the terms of a lease which is subsequently to be committed to writing and executed by the parties and containing nothing which authorizes the lessee to enter into possession, is not a lease. It is an agreement to make a lease which either party may rescind until it is executed unless the owner has permitted the lessee to go into possession, in which event it creates a tenancy at will. The lessee is not entitled to possession under such an agreement as it is is not a lease, but has an action in damages for a breach of it, consisting of a refusal to execute a lease. Thus, where an "agreement" was made by an owner to lease his premises and he subsequently thereto receipted for a sum of money "on account of an agreement for a lease, for which details are to be settled on" and a lease was thereafter drawn which contained terms which were not contained in the writing, there was no lease but merely an agreement to make a lease at some future date.³² An owner and another person may make

³⁰ *Gibson v. Needham*, 96 Ga. 172, 174, 22 S. E. Rep. 702.

³¹ *Arnold v. R. Rothschild's Sons Co.*, 164 N. Y. 562, 58 N. E. Rep. 1085, affirming 37 App. Div. 564, 56 N. Y. Supp. 161; *Larousini v. Werlien*, 52 La. Ann. 424, 27 So. Rep. 89; *Francke v. Hewitt*, 56 App. Div. 497, 501, 68 N. Y. Supp. 968, in this case the tenant being in possession of the building was told by the landlord to go ahead and make repairs and he would prepare a lease according to terms as to rent, etc., which had

been orally agreed on by the parties. *Martin v. Davis*, 96 Iowa, 718, 65 N. W. Rep. 1001, where the writing was as follows: "Agreement, this is to certify that I have rented my farm for the year 1895 for the some of \$300.00 payment to be stated in contract to the said D. (Signed) L. M." and the court refused to regard this as a lease but merely a memorandum for a future lease.

³² *Charlton v. Columbia Real Estate Co.*, 64 N. J. Eq. 631, 54 Atl. Rep. 444, in which the court says

an agreement to execute a lease at a future time upon the condition of the occurrence of a some future event. They may agree that if a certain specified event shall happen the owner and the other person shall make a lease and they may also agree upon all the terms upon which the future lease shall be made. If the event upon which the making of the lease is conditioned shall happen, the owner is obligated to make the lease and the promisee may recover damages for his failure to do so. If the event shall not happen there is no duty upon either party to enter into a lease. Thus an agreement by an owner to make a lease to a railroad company provided the road shall be completed within a year is an agreement upon condition, to be void if the road is unfinished, is not a lease and does not create the relation of landlord and tenant between the parties to it.³³

that it is absurd to say the parties have entered into an agreement when the only evidence of such agreement is a writing stating that details are to be settled at some future time, citing *Ridgway v. Wharton*, 6 H. L. C. 305.

³³ *Proctor v. Benson*, 149 Pa. St. 254, 258, 24 Atl. Rep. 279. A writing containing the language "I hereby agree to give a lease" cannot be construed as a lease where the circumstances attending its execution show that the parties to it meant that a formal lease in writing was to be executed before possession was delivered to the tenant. *St. Louis Brewing Ass'n v. Niederluecke* (Mo. App. 1903), 76 S. W. Rep. 645. "The general rule is stated to be that no precise words or technical form of language are required to constitute a present demise, and that if there are words showing a present intention that one is to give, and the other to have possession for a determinate term a tenancy is created; and that where there are

words of present demise the instrument should operate as a lease, and not as an agreement for a lease." By the court in *Colclough v. Carpeles*, 89 Wis. 239, 244. In pleading a lease at common law it is a rule to plead a lease according to its legal effect. If this is done and the plaintiff proves only an agreement for a lease it is a material variance. *Price v. Williams*, 1 Mee. & Wel. 6, 13. In the case of *Francke v. Hewitt*, 56 App. Div. 497, the question of contracts to make leases was very thoroughly discussed. This is an interesting case and should be carefully read. The court held in substance that a tenancy might be created where the negotiations are in writing and a formal written contract is stipulated for into which the negotiations are to be reduced. And if the minds of the parties meet upon all the terms of the future lease and these terms are in all respects definitely understood and agreed upon the contract is a complete lease though

§ 178. **Question for court or jury.** Whether a writing constitutes a lease is a question for the court to determine as a matter of construction. . If an oral agreement is relied upon and the facts are undisputed the court may determine whether it is a lease without submitting the question to the jury.³⁴ This rule of practice is based upon the rule that the construction of a writing is a question for the court. The court may determine that a writing is a lease and at the same time it may require or permit oral evidence of an entry by the tenant. If there is any contradiction as to the entry and occupation by the tenant it is not error to leave the question of the existence of the relationship of landlord and tenant to the jury upon all the facts.³⁵ Where there is a dispute as to the facts the question whether the relationship of landlord and tenant exists is one of fact for the jury to determine.³⁶

§ 179. **The intention of the parties.** The general rule that the nature of an instrument depends upon its construction and that this is always a question of the intention of the parties is applicable to a lease. Whether an instrument is or is not a lease always depends upon what the parties intended it to be. The intention under general rules must be collected from the whole instrument regarded in the light of the surrounding circumstances.³⁷ The fact that the parties called it a lease is not always controlling. The question whether an instrument is or is not a

the subsequent lease was never executed. The court cited *Wilbur v. Collins*, 4 App. Div. 418, in which it was said if the minds of the parties did not meet as to all essential parts of the contract there was no lease. Of course, if a written contract was subsequently to be drawn up and it was left until then to agree upon some of its terms and conditions there was no lease.

³⁴ *Howard v. Carpenter*, 22 Md. 10.

³⁵ *Baldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131.

³⁶ *Doc v. Gray*, 2 Houst. (Del.) 135; *Jackson v. Vosburgh*, 7 Johns. (N. Y.) 186; *Rothermel v. Dunn*,

119 Pa. St. 637, 13 Atl. Rep. 632; *McKenzie v. Sykes*, 47 Mich. 294, 11 N. W. Rep. 164; *Chamberlin v. Donohue*, 44 Vt. 57.

³⁷ *Johnson v. Phoenix M. L. I. Co.*, 46 Conn. 92; *Potter v. Mercer*, 53 Cal. 667, 672; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401, 405; *Gibson v. Needham*, 96 Ga. 172, 22 S. E. Rep. 702; *Jackson v. Delacroix*, 2 Wend. (N. Y.) 433, 439; *Griffin v. Knisely*, 75 Ill. 411; *Donovan v. P. Schoenhaefer Brewing Co.*, 92 Mo. App. 341; *Salomon v. Weisberg*, 61 N. Y. Supp. 60; *Thornson v. Payne*, 5 Johns. (N. Y.) 74; *Colclough v. Carpeles*, 89 Wis. 239, 245; *Shaw v. Farnsworth*, 108 Mass. 357.

lease is sometimes very important for frequently by statute the landlord is entitled to remedies under a lease which parties to other contracts cannot enforce. The intention for this reason is particularly important for if the parties did not intend the instrument to be a lease then it follows that they did not intend that the owner of the lease should have these remedies against the other parties to the contract which the landlord generally possesses. As is elsewhere seen there are certain appropriate words which are commonly used in leases. But the instrument is not a lease though it contains the usual word "demise," if its contents show that the parties to it did not intend that it should be a lease.³⁸ For the court may do violence to the express language of any writing rather than nullify the intention of the parties by construing it so that the writing is a lease where the intention of the parties was manifestly otherwise.³⁹ The question as to what is the instrument, often arises in attempting to distinguish between a lease and an agreement for a lease. The use of the words "agrees to let," or similar words in the writing is not alone conclusive if the parties intended that the writing should be merely an agreement for a lease.⁴⁰ Such language may constitute an actual hiring or leasing of real property if upon all the language of the instrument it is apparent that the parties intended to make a lease; but an express provision in an instrument that it shall not operate as a lease but only as an agreement for a future lease is conclusive on the court to show the real intention of the parties in spite of any inferences to the contrary that may be gathered from other parts of the same writing.⁴¹

§ 180. **The assent of the parties to a lease.** The general rules and principles which regulate and govern the law of contracts in relation to the necessity for the assent of the parties thereto are always applicable to contracts to lease. There must be a meeting of the minds of the parties; that is, there must be an assent or agreement of the persons who claim or are claimed to be landlord and tenant before there can be a lease. In other

³⁸ *Taylor v. Caldwell*, 3 B. & S. 826, 32 L. J. Q. B. 164, 8 L. T. 256, 11 W. R. 726.

³⁹ *Jackson v. Delacroix*, 24 Wend. (N. Y.) 433, 439; *Hallett v. Wylie*, 3 Johns. (N. Y.) 44.

⁴⁰ *Weed v. Crocker*, 13 Gray (Mass.) 219, 224; *John v. Jenkins*, 3 Tyr. 177; *Browne v. Warner*, 14 Ves. 156.

⁴¹ *Perring v. Brooke*, 1 Mood. & Ry. 510.

words, as the law is laid down in the general law of contracts, there must be an offer on the one side and an acceptance on the other, and the lease is not made until the offer in all its details is met by an acceptance which includes the whole of the offer.⁴² It is immaterial by whom the offer is made provided it be accepted nor must the offer be couched in express language for an offer may be made by conduct as well as by language. On the other hand, the acceptance of the offer may be by conduct, as for example by the tenant to whom premises have been offered, entering into the possession of the same. The offer must be absolutely accepted in order to make a lease and the terms proposed by the parties making the offer must be assented to in their entirety. A counter-offer rejecting a portion and accepting a portion of the original offer is permitted, but until this counter-offer is in its turn accepted, no lease exists. Thus, where the landlord offers the premises to be leased at a rental specified by him, an offer by the proposed tenant at a lower rental is not an acceptance. And if the so-called acceptance of an offer by the landlord differs in the particulars from the offer made either in the rent to be paid,⁴³ in the character of the premises, or in their use; in the length of the term or in any other material respect; or it attempts in any way to vary the offer, there is no assent and consequently no lease. The person to whom the proposal for a lease is made may either wholly accept or he may wholly reject. Either of these he will be presumed to have done for an answer to offered terms suggesting other terms differing from the offer is conclusively presumed to constitute a rejection of the terms offered.⁴⁴ Hence, where a lease in writing

⁴² *Ver Steeg v. Becker*, Moore Paint Co. (Mo.), 80 S. W. Rep. 346, 353; *Wood v. Scarth*, 2 Kay & J. 33, 1 Jur. (N. S.) 1107, 4 W. R. 31.

⁴³ *Scottish Mortg. Co. v. Taylor* (Tex. 1905), 71 S. W. Rep. 564.

⁴⁴ *Hammond v. Winchester*, 82 Ala. 470, 476, 2 So. Rep. 892; *Smith v. Ingram*, 90 Ala. 529, 531, 8 So. Rep. 141; *Cochrane v. Justice Mining Co.*, 16 Colo. 415, 26 Pac. Rep. 780; *Gifford v. King*, 54 Iowa, 525, 529, 6 N. W. Rep. 735; *Erickson v. Wallace*, 45 Kan. 430, 25 Pac.

Rep. 898, 899. See, also, *Culton v. Gilchrist*, 92 Iowa, 718, 721, 61 N. W. 384, 385; *Jackson v. Rode*, 7 Misc. Rep. 680, 682, 28 N. Y. Supp. 147; *Smith v. Caputo*, 14 Misc. Rep. 9, 10, 35 N. Y. Supp. 127; *Gramm v. Sterling*, 8 Wyo. 527, 535, 59 Pac. Rep. 156; *Majors v. Goodrich* (Tex.), 54 S. W. Rep. 919; *Lever v. Koffler*, 70 Law J. Ch. 395, (1901) 1 Ch. 543, 84 Law T. 584, 49 Weekly Rep. 506; *Castro v. Gaffey*, 96 Cal. 421, 31 Pac. Rep. 363; *Hill v. Coal Valley Min. Co.*,

was by the lessor sent to the lessee for his signature, and the latter, without the consent of the lessor, put in the lease a clause giving him the privilege of sub-letting and binding the lessor to keep in repair a portion of the premises, there is no acceptance of the lessor's offer. The alterations and insertions are a material variation from the offer. Unless they shall in turn be accepted by the lessor they are the same as a rejection of the lessor's offer.⁴⁵ An offer to execute a lease being without consideration is revocable any time before its acceptance. If a time is specified for the acceptance of the offer by the other party, the offer is presumptively open for acceptance during that period; and, if the person who has made the offer desires to revoke it during that time he must notify the other party of his intention to do so. The offer to make a lease in such case is a continuing offer unless expressly revoked during the time which is limited for its acceptance; it may be accepted or rejected by the person to whom it is made at any time during the period named. Before the offeree shall have acted upon it, the person making the offer may revoke it, but after the former has accepted it by conduct or words, it becomes a lease. Before the acceptance there is neither any assent nor consideration upon which a valid and binding lease could be predicated. The acceptance of the offer of a lease at the same instant supplies both assent and consideration and creates a contract of lease whose terms are those contained in the offer. The minds of the parties have met upon terms satisfactory to both and the acceptance of the offer by the party to whom it was made is a good and valid consideration for the party who has made the offer.⁴⁶ The acceptance of the offer to constitute a valid lease need not be couched in any particular language. So, where an offer is made to rent premises and it is neither expressly rejected, nor declined, a subsequent inquiry by the prospective lessee if he could move in to which an affirmative answer is made will constitute a lease.⁴⁷ So, the acceptance of an offer of a lease made by the owner may be im-

103 Ill. App. 41; *Smith v. Colby*,
136 Mass. 532; *Highland Co. v.*
Rhoads, 26 Ohio St. 411.

⁴⁵ *Ver Steeg v. Becker, Moore*
Paint Co. (Mo.) 80 S. W. Rep.
346, 353.

⁴⁶ *Pettibone v. Moore*, 73 Hun,
461, 464, 465, 27 N. Y. Supp. 455
(lease).

⁴⁷ *Smith v. Ingram*, 90 Ala. 529,
8 So. Rep. 144.

plied from the conduct as well as from the language of the tenant. Thus, where an owner in reply to an inquiry by a tenant whose lease was soon to expire, informed the latter by mail that he expected to be in their county in a short time but that if the tenant did not see him or hear from him in the course of a few days, he might rely on having the land on terms mentioned, the action of the tenant in holding over and proceeding to break the land and put in a crop shows an acceptance of the landlord's terms.⁴⁸

§ 181. **The consideration for the lease.** There must also appear some consideration, whether express or implied, in the lease. It may appear in the written lease itself or it may be proved by parol evidence. The general rules of law regulating the subject of consideration, so far as they apply to the law of contracts are applicable to leases and these rules as generally set out in the text books and cases may be consulted. A lease without any consideration is void.⁴⁹ A promise by each of the parties to the lease to the other is the usual consideration in a lease. The

⁴⁸ *Springer v. Cooper*, 11 Ill. App. 267. There is no contract of lease where the negotiations are conducted entirely by letters through the mail, and the proposed tenant requests to lease the land for five years while the proposed landlord in reply states that he can have it for three, but the tenant does not accept this proposition. An offer of one party assented to by the other will constitute a lease but the assent must comprehend the whole of the proposition. The assent must be exactly equal in its extent and terms and must not qualify the acceptance with new matter. Hence, an acceptance of the offer on terms varying for it is certainly a rejection. *Errickson v. Wallace*, 45 Kan. 430 433, 25 Pac. Rep. 898. A lease is not made where a tenant, being in possession, another party applies by telegram to rent the house for a month and the land-

lord refusing to rent for a month says he may have it for a year. *Gifford v. King*, 54 Iowa, 525, 530, 6 N. W. Rep. 735. A letter which accepted the terms offered by the landlord but also stated that the tenant would like to build a cook room with a privilege to remove it constitutes a lease and the question in regard to the cook room is not a variance of the offer. *Culton v. Gilchrist*, 92 Iowa, 718-721, 61 N. W. Rep. 384. It is not essential that the offer of lease should be accepted in writing. Moving into the premises after having asked by telephone whether it would be satisfactory without proposing or suggesting any change of the terms is an acceptance of the landlord's offer and is a sufficient lease. *Smith v. Ingram*, 90 Ala. 529, 531, 2 So. Rep. 892.

⁴⁹ *Brown v. Roberts*, 21 La. Ann. 508, 510.

consideration passing from the tenant to the landlord is the promise of the tenant to pay rent to the landlord or to some third person at his request. On the part of the landlord the consideration is his demise of the premises for a stipulated term and his promise to give possession. This is a good consideration on the part of the landlord though it is not under seal.⁵⁰ So an express reservation of rent by the landlord, or a promise to pay him rent though it is not under the seal of the tenant, is also a good consideration for the covenants of the landlord, but such a promise is not indispensable in a lease as it may always be implied.⁵¹ Other considerations by the tenant are equally valid. The tenant may promise to pay rent in goods or produce or he may promise to render the landlord personal services for the rent, or he may promise to board and maintain him. Any of these promises are good as a consideration. A new lease entered into by the parties to take the place of the old one must be upon a new consideration which differs from the consideration in the old lease. An agreement by a tenant who holds under a lease by which the rent is payable monthly that he will thereafter pay rent semi-monthly is a sufficient consideration on his part for a new lease at a lower rental. The new lease having been fully executed by the tenant continuing in possession and the rent paid by him in accordance with its terms while he is in possession a landlord cannot thereafter claim that it is void because without consideration.⁵²

§ 182. **Some circumstances which tend to show an instrument is a lease.** Various circumstances in connection with the execution of an instrument in writing concerning which the inquiry is whether it is a lease or merely an agreement to make one, have been seized upon by the courts to enable them to determine the true character of the writing. So, also, the court will always take into consideration the mode in which the parties are to carry out or perform the writing. The intention and substance of the writing will be considered rather than its form.^{52a}

⁵⁰ Hill v. Woodman, 14 Me. 38, 43.

⁵¹ Chadbourn v. Rahilly, 34 Minn. 346, 25 N. W. Rep. 643.

⁵² Goldsborough v. Gable, 36 Ill. App. 363, 369.

^{52a} "When an agreement for a lease has been reduced to writing,

and even though it contain a stipulation that a formal lease in writing shall be subsequently executed, the question has frequently arisen whether the written agreement operates as a lease *in presenti*, or only as an agreement for a lease *in futuro*. In such cases

The circumstance that the tenant is let into possession under the so-called agreement for a lease, is often the controlling fact to show that the parties intended a present lease,⁵³ but the circumstances that the tenant is in actual possession, and so need not be let into possession, is not controlling if upon all the facts, the parties meant the agreement to be a lease.¹⁴ The circumstance that a tenant entered on premises under what appears to be an agreement for a lease and expends a large amount of money in making improvements with the knowledge of the landlord, may indicate an intention that the instrument shall be taken as a lease. It is presumed that the tenant would not have spent the money unless he believed that the possession was secured to him by a lease.⁵⁵ An instrument containing words of present

the rule, as established by numerous decisions is, First, that effect will be given to the instrument according to the intention of the parties, to be ascertained from all the terms of the instrument itself, considered in the light of the surrounding circumstances. Second, that if the instrument contain words of a present demise, it will be deemed a lease *in presenti*, unless it appear from other portions of the instrument that such was not the intention of the parties. Third, that if possession be given under the agreement this will be a circumstance tending to prove that it was intended as a lease *in presenti*." By the court in *Potter v. Mercer*, 53 Cal. 667, 673.

⁵³ *Hanerton v. Stead*, 3 B. & C. 478; *Chapman v. Bluck*, 4 Bing. (N. C.) 187, 5 Scott, 513, 1 Arn. 15, 7 L. J. C. P. 100, 2 Jur. 206.

⁵⁴ *Doe d. Phillips v. Benjamin*, 9 A. & E. 644, 1 P. & D. 440, 8 L. J. Q. B. 117.

⁵⁵ *Poole v. Bentley*, 12 East, 168, 2 Camp. 286. The entry into possession by a tenant under an agreement for a lease was held to constitute a lease although the

agreement was to execute a lease in the future. *Poole v. Bentley*, 12 East, 168, in which case Lord Ellenborough said in substance that while the intention was to control, the fact that the tenant was to expend much capital upon the premises during the first four years of the term shows that he was to have a present legal interest in the term which was to be binding on both parties although after progress was made in building a more formal lease in which the premises might be more particularly described would be executed. This case was cited in *Chapman v. Bluck*, 4 Bing. (N. C.) 187, 195, where the court said that while it was difficult to reconcile all the cases on the question whether certain instruments shall be taken to operate as agreements for leases or as actual demises, the fact that the tenant entered possession after a correspondence between the parties constituted him a lessee and the landlord was authorized to distrain for rent. For other cases in which an agreement contained words of present demise has been held to be a lease,

demise will be construed as a lease, if such is the intention of the parties, though the instrument contains a clause for the preparation of a future lease.⁵⁶ An agreement for a lease containing a stipulation which provides for an execution of a formal lease, and that in the meantime until such lease shall be executed, the tenant is to pay rent and to hold the premises subject to the covenants which are to be inserted in the lease when it is executed, is a lease and not merely an agreement to make one.⁵⁷

§ 183. **No presumption of tenancy from possession alone.** The mere fact that one man is in possession of land owned by another though a circumstance to be considered in determining whether the relation of landlord and tenant exists between them,

though it contained a stipulation for the execution of a lease in the future, see *Pearce v. Cheslyn*, 5 N. & M. 652, 4 A. & E. 225, 1 H. & W. 768, 5 L. J. K. B. 113; *Doe d. Pearson v. Ries*, 8 Bing. 178, 1 M. & Scott, 259, 1 L. J. C. P. 73; *Chapman v. Bluck*, 4 Bing. (N. C.) 187, 5 Scott, 513, 1 Arn. 15, 7 L. J. C. P. 100, 2 Jur. 206; *Doe d. Phillips v. Benjamin*, 9 A. & E. 644, 1 P. & D. 440, 2 W. W. & H. 96, 8 L. J. Q. B. 117; *Curling v. Mills*, 7 Scott (N. R.) 709, 6 Man. & G. 173, 12 L. J. C. P. 316; *Tarte v. Darby*, 15 M. & W. 601, 15 L. J. Ex. 326; *Wilson v. Chisholm*, 4 Car. & P. 474.

⁵⁶ *Poole v. Bentley*, 12 East, 168, 2 Camp. 286; *Warman v. Faithful*, 3 N. & M. 137, 5 B. & Ad. 1042, 3 L. J. K. B. 114; *Doe d. Jackson v. Ashburner*, 5 Term Rep. 163.

⁵⁷ *Pinero v. Judson*, 6 Bing. 206, 3 M. & P. 497, 8 L. J. (O. S.) C. P. 19, 31 R. R. 388; *Hancock v. Caffyn*, 1 M. & Scott, 521, 8 Bing. 358, 1 L. J. C. P. 104; *Doe d. Walker v. Groves*, 15 East, 244. "There may be many things about which the parties may enter in such a case into a written agreement,

without its being a demise, taking it for granted that a demise already exists, or will exist. For example, the one party may agree to lay out money on the premises in consideration that the other will agree that he shall thereafter become tenant. This paper clearly refers to some parol agreement between the parties, containing some other stipulation. Where the parties signed an agreement containing all the particulars of a demise, it may no doubt be considered as imparting a present interest, though it contains words of agreement on the part of one of them only. But that is where it contains all the terms of the demise, which is not the case here. There is no statement of the commencement or duration of the tenancy, no stipulation that the party shall occupy for a year or a longer period, and nothing more than a legal inference that if he occupies for a year he must pay rent at the rate therein mentioned." By Lord Abinger, C. B., in *Gore v. Lloyd*, 13 L. J. Ex. 366, 12 Wm. & W. 463.

by no means raises any presumption of a tenancy existing in the absence of proof of a letting and hiring express or implied.⁵⁸ If the occupant is in possession without the consent of the true owner he is merely a trespasser from whom no rent can be collected and against whom the only remedy is an action of ejectment or trespass as the circumstances of the case may indicate. Even the fact that the occupant is in possession with the consent of the owner does not, taken in connection with the possession, conclusively show that the relationship of landlord and tenant exists. It must also be shown that the occupant holds possession, not only with the consent of the owner but under and in subordination to the title of the latter. In other words, the true test of the relationship of landlord and tenant is to ascertain, first whether the person claiming or who is claimed to be a tenant holds possession with the assent of the owner, and second, if such be the case, whether he holds in subordination to the title of the owner.⁵⁹

§ 184. **The length of the term in an agreement to make a lease.** The parties to an agreement to make a lease *in futuro* must be particularly careful to see to it that the agreement either expressly states the length of the term which is to be created by the lease or that it states some fact or circumstance from which the length of the term may be ascertained. The agreement must

⁵⁸ Bailey v. Campbell, 82 Ala. 342; Hardin v. Bailey, 79 Ala. 381; Carger v. Fee, 140 Ill. 582, 39 N. E. Rep. 93; Cummings v. Smith, 114 Ill. App. 35; Pittsburgh, C. & St. L. v. Thornburgh, 98 Ind. 201; Hall v. Jacobs, 7 Bush (Ky.) 595; Jordan v. Mead, 19 La. Ann. 101; Paige v. Scott's Heirs, 12 La. 490; Fisk v. Moore, 11 Rob. (La.) 279; Curtis v. Treat, 21 Me. 525; Leonard v. Kingman, 136 Mass. 123; Edmonson v. Kite, 43 Mo. 176; Williams v. Berier, 31 Mo. 13; Dixon v. Ahearn, 19 Nev. 422, 24 Pac. Rep. 337; Crosby v. Horne & Danz Co., 45 Minn. 249, 47 N. W. Rep. 717; Stewart v. Finch, 31 N. J. Law, 17; Alt v. Gray, 90 St. Rep. 657, 56 N. Y.

Supp. 657, 26 Misc. Rep. 843; Harris v. Frink, 2 Lans. (N. Y.) 35.

⁵⁹ Littleton v. Wynn, 31 Ga. 583; Turner v. Davis, 48 Conn. 397; Loring v. Taylor, 50 Mo. App. 81; Chambers v. Ross, 25 N. J. Law, 293; Twiss v. Boehmer, 39 Oreg. 359, 65 Pac. Rep. 18; Victory v. Stroud, 15 Tex. 573; Heddleston v. Stoner, 128 Iowa, 525, 105 N. W. Rep. 56; Page v. McGlinch, 63 Me. 472, 476; Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536; Hogsett v. Ellis, 17 Mich. 351; Steen v. Scheel, 46 Neb. 252, 64 N. W. Rep. 957; Skinner v. Skinner, 38 Neb. 756, 57 N. W. Rep. 534; Farley v. McKeegan, 48 Neb. 237, 67 N. W. Rep. 161.

state both the length of the term and the date of its commencement, in order that it may be enforceable in equity. Generally the fact that a memorandum for a lease does not contain the date upon which the term is to commence, will prevent it from being in compliance with the statute of frauds.⁶⁰ Such an agreement to make a lease cannot be specifically performed.⁶¹ It has been held sufficient in one case if the date can be supplied by parol evidence. Though the agreement for a lease may not state the date, it will be sufficient under the statute, and for specific performance if it refers to a circumstance from which the date may be implied.⁶² There is no inference that the term is to commence from the date of the agreement where it is not so expressly provided. It is a presumption that parties who agree to make a lease intend one to be prepared which shall be dated on a subsequent day and possession is usually not surrendered to the tenant until such a lease is executed by both parties. There is no presumption therefore that the date of the agreement to make a lease is to be the date of the lease unless indeed the writing which is called an agreement to make a lease, is a lease itself. Under such circumstances, the contract for a lease being deficient in certainty, will not be specifically enforced.⁶³ An agreement which provides that a tenant is to be given possession within one month from its date sufficiently states the commencement of the term, and the lease is to commence when possession is given. Such a contract is sufficiently definite to warrant specific performance.⁶⁴ But an agreement containing proposed terms for a future lease with an acceptance by the lessee on condition the premises are in repair, is not a lease because the time is not fixed

⁶⁰ *Clarke v. Fuller*, 16 C. B. (N. S.) 24, 12 W. R. 671; *Marshall v. Berridge*, 51 L. J. Ch. 329, 19 Ch. D. 233, 45 L. T. 599, 30 W. R. 93, 46 J. P. 279; *Oxford Corporation v. Crow*, 3 Ch. 535, 8 R. 279, 69 L. T. 228, 42 W. T. 200; *Jaques v. Millar*, 6 Ch. D. 153, overruled. See, also, *May v. Thomson*, 20 Ch. D. 705.

⁶¹ *Blore v. Sulton*, 3 Mer. 237, 17 R. R. 74.

⁶² *Phelan v. Tedcastle*, 15 L. R. Ir. 169.

⁶³ *Marshall v. Berridge*, 51 L. J. Ch. 329, 19 Ch. D. 233, 45 L. T. 599, 30 W. R. 93, 46 J. B. 279; *Wyse v. Russell*, 11 L. R. Ir. 113; *Dolling v. Evans*, 15 W. R. 394. Compare *Jacques v. Millar*, 47 L. J. Ch. 544, 6 Ch. D. 153, 37 L. T. 151, 25 W. R. 846, which was overruled.

⁶⁴ *Marshall v. Berridge*, 19 Ch. D. 233, discussed and applied; *Lauder and Bagley's Contract*, *In re*, 61 L. J. Ch. 707, 3 Ch. 41, 67 L. T. 521.

when the tenancy is to commence. So, too, the fact that though signed by the parties, the terms are only to go into effect upon the performance by the landlord of certain things which might or might not be done by him, prevents the instrument from becoming or being regarded as a present lease.⁶⁵

§ 185. **The term as stated in the lease.** The term for which the premises may be occupied must be certain and fixed by the lease itself or there must be method indicated by the instrument by which the length of the term may be determined. The writing must fix its commencement, and duration, or describe some certain event upon the happening of which it is to commence.⁶⁶ Unquestionably a lease may be signed, the term of which may be made to begin on the occurrence of some event in the future.⁶⁷ Thus a lease is not invalid because of the uncertainty of the term created therein where the day on which the term is to end is specified and the rental is to begin to be paid when a building not in existence but which the landlord agrees to erect on the property within a certain date is ready for occupancy.⁶⁸ So, also, a written lease of a room in a building in process of erection for five years from the completion of the building is a valid lease for a term to begin *in futuro*. The certainty of the term is fixed by the completion of the building and the occupancy of the room and payment of rent by the lessee. The absence of an express agreement by the lessor to complete the building does not render the term uncertain for such an agreement will be implied under the circumstances. The completion of the building is a condition precedent to the beginning of the term though the fact that in some respects the work was unsatisfactory to the lessee is not material on his liability where he entered, occupied and paid rent.⁶⁹ So, not only must the beginning of the term be ascertained or be ascertainable by the lease but the end must not be uncertain. Thus, in a lease for a year which gave the lessee "a privilege of longer," the latter phrase

⁶⁵ Doe d. Wood v. Clarke, 7 Q. B. 211, 14 L. J. Q. B. 233, 9 Jur. 426.

⁶⁶ Colclough v. Carpeles, 89 Wis. 239, 245, 246, 61 N. W. Rep. 836.

⁶⁷ See Wilcox v. Bostick, 57 S. C. 151, 35 S. E. Rep. 496; Bussman

v. Ganster, 72 Pa. St. 285; Trull v. Granger, 8 N. Y. 115, 118; Blear v. Flues, 64 N. Y. 518, 520.

⁶⁸ Colclough v. Carpeles, 89 Wis. 239, 61 N. W. Rep. 836.

⁶⁹ Hammond v. Barton, 93 Wis. 183, 67 N. W. Rep. 412.

was held to be so indefinite as to time that the tenant could not remain in possession longer than a year.⁷⁰

§ 186. **Entry into possession as indicating a lease.** In determining whether a writing is a lease or merely an agreement for one, the entry into possession of the lessee with the consent of the lessor is a circumstance which tends to throw some light on the intention of the parties. The same principle is true where it is necessary to ascertain the intention of the parties to an oral agreement. But entry and possession are never relevant unless the intention is ambiguous or doubtful, for if it be clear from the language employed that the agreement was to make a lease *in futuro*, and not a lease *in presenti*, the delivery of possession is absolutely immaterial. In other words, proof of delivery of possession is not received to alter, vary or modify the intention as shown by the language of the parties, whether oral or written, but solely to show what the intention is.⁷¹ The entry of a person in the capacity of a tenant on premises, who has by parol agreed with the owner to execute a written lease is a tenancy at will. Where the lease was to be for a year, an entry under an agreement will be a lease for one year though the yearly lease was never executed.⁷²

⁷⁰ Howard v. Tomicich, 81 Miss. 703, 33 So. Rep. 493. A mistake as to the termination of the term of a lease, caused by writing the figure "8" instead of the word "eighty" before the word "eight" in the date 1888 will not defeat a recovery on the lease. Nyquist v. Martin, 35 Ill. App. 623. An agreement to make a lease "for one or more years" is sufficiently certain as to the length of the term to enable the tenant to procure its specific performance, as it has been construed that the term "one or more years" means at least two years and perhaps more in the option of the tenant. Boston Clothing Co. v. Solberg (Wash. 1902), 68 Pac. Rep. 715.

⁷¹ Potter v. Mercer, 53 Cal. 667, 672; Cheney v. Newberry, 67 Cal.

125, 7 Pac. Rep. 444; Jenkins v. Eldridge, 13 Fed. Cases, 7268, 3 Story, 325; Goldberg v. Wood, 90 N. Y. Supp. 427, 428, 45 Misc. Rep. 327.

⁷² Bonaparte v. Thayer, 95 Md. 548, 52 Atl. Rep. 496. The action of the landlord in permitting one who expects to be his tenant to go on the premises to repair while negotiations are under way for the execution of a long lease does not establish an oral lease for a short term. It is very evident that this was done simply for the accommodation of the prospective tenant. Herbert v. Gallatin, 163 N. Y. 575, 57 N. E. Rep. 1112, affirming 22 App. Div. 623, 47 N. Y. Supp. 778, 779. A finding that there had been a contract to lease the premises for one year is not justified where

§ 187. The presumption of an existing tenancy from the payment of money by the occupant to the owner. The circumstance that a person in the actual possession and occupation of land pays money to the owner is relevant to show the relations of the parties and, while taken alone it may have no significance, yet in connection with other circumstances it may raise a conclusive presumption that the relationship of landlord and tenant existed between the payor and the payee. If upon all the circumstances, it is apparent that the owner received or claimed to receive the payments as a lessor of the premises and that the occupant either assented thereto by words or conduct, or remained silent in reference to the character in which the lessor received the money, then it will be conclusively presumed that the relation of landlord and tenant existed between the parties. The presumption of the existence of the relation of landlord and tenant arises from the payment of money as rent and if it is proved that the money was paid as rent then it is conclusively presumed that the relationship out of which the payment of rent alone grows, exists.⁷³ This presumption has been applied in the case of a tenant holding over. In fact this is a very frequent application for the whole doctrine of tenancy by holding over is based upon the payment of rent. The payment of rent creates a presumption of a tenancy, the term of which depends upon the time intervening between the rental payments. Usually the presump-

the defendant after receiving a proposition from the plaintiff as to leasing a coal yard for a year, occupied the premises for a short time without signing a written lease or coming to any definite agreement. *Gramm v. Sterling*, 8 Wyo. 527, 59 Pac. Rep. 156.

⁷³ *Kelly v. Eyster*, 102 Ala. 325, 14 So. Rep. 657; *Rainey v. Capps*, 22 Ala. 288; *Barrett v. Jefferson*, 5 Houst. (Del.) 567; *Flagg v. Gelmacher*, 98 Ill. 293; *Voight v. Resor*, 80 Ill. 331, 332; *Cressler v. Williams*, 80 Ind. 366, 368; *Duffy v. Carman*, 3 Ind. App. 207, 210, 29 N. E. Rep. 454; *Andrews v. Erwin*, 25 Ky. Law Rep. 1791, 78 S. W. Rep. 902, 903; *Brandagee v.*

Fernandez, 1 Rob. (La.) 260; *Enrich v. Stock Yard Co.*, 86 Md. 482, 38 Atl. Rep. 843; *Squire v. Ferd. Heim Brewing Co.*, 90 Mo. App. 462; *Hill v. Boutell*, 3 N. H. 502 (a promise to pay rent); *Decker v. Hartshorne*, 65 N. J. Law, 87, 89, 48 Atl. Rep. 1117; *Simmons v. Pope*, 84 N. Y. Supp. 973, 974; *Weinhaner v. Eastern Brewing Co.*, 85 N. Y. Supp. 354; *Van Rensselaer v. Secor*, 32 Barb. (N. Y.) 469, 473; *Weaver v. Southern Oregon Co.*, 31 Oreg. 14, 48 Pac. Rep. 167; *Virginia Mining and Improvement Co. v. Hoover*, 82 Va. 449, 4 S. E. Rep. 680; *Braythwayte v. Hitchcock*, 10 Mee. & Wel. 494.

tion is invoked in favor of the landlord against the tenant but it is of equal service in favor of the tenant, that is, though a term is created solely by payment of rent, the tenant is still entitled to notice to quit, and cannot be ousted except by the proper statutory proceedings. The fact, also, that one who himself pays rent to the owner of the premises receives money for the use of the premises from other persons who occupy them and gives receipts in his own name to such persons may also be considered to show he is a tenant. This presumption is rebuttable only by showing that the money paid was not paid as rent but with some other intention in the minds of both payor and payee.⁷⁴

§ 188. **The necessity for the payment of rent.** While, on the one hand, the existence of the relation of landlord and tenant may generally be implied from an agreement to pay rent for land; on the other hand, it is by no means an absolute rule that there must always be an express promise or a contract to pay and to receive rent in order to create the relationship of landlord and tenant. Indeed, there may be a tenancy where it is absolutely proved that there was no express agreement to pay rent and where the only basis for the claim for rent on the part of the landlord is the implied promise of the tenant to pay for the use and occupation of the land. Thus, a tenant holding over by consent or at the sufferance of the landlord is still a tenant; and the person of whom such possession is held continues to be the landlord, though it is understood between the parties that the person holding over is to pay no rent. The landlord may pursue all his ordinary remedies against the person holding over as his tenant and he need not show that that person has agreed to pay rent.⁷⁵ So, while mere possession alone given without any express agreement to pay rent, may not under some circumstances create the relationship of landlord and tenant, still if from the language of the agreement it is clear that the parties intended by

⁷⁴ The owner of the equitable title of the premises by once paying rent to the holder of the legal title does not thereby necessarily recognize him as her landlord, where from the evidence it is clearly apparent such payment was made simply to prevent being evicted from the premises, and to

gain time in which the equitable owner might bring a suit to establish her equitable title. *Hudson v. White*, 17 R. I. 519, 23 Atl. Rep. 57, 63.

⁷⁵ *McKissack v. Bullington*, 37 Miss. 535, 538; *Hunt v. Comstock*, 15 Wend. (N. Y.) 665, 666.

the occupation to stand in the relationship of landlord and tenant to each other, the fact that the occupant by an express agreement is to occupy the land rent free will not alone be sufficient to destroy the tenancy.⁷⁶ The owner of land may, as against the occupant who holds without his consent, create a tenancy by notifying the occupant that if he continue to occupy the land he will have to pay rent. Thus, one who continues to occupy premises after he has been notified that he will be required to pay rent if he remains in possession becomes liable as a tenant for the rent though he may not have paid rent before the notification. The notification of the landlord and the action of the occupant create a lease the terms of which as to its duration and rental periods will depend upon the agreement of the parties to be inferred from the language of the notification, and the action of the tenant. This rule applies to occupants who are trespassers or tenants at will or sufferance but not to those who occupy premises under a claim which is adverse and hostile to the owner.⁷⁷

§ 189. The performance of a contract to execute and deliver a lease. A formal lease properly executed and tendered by the lessor in the performance of his contract to execute a lease must in its terms and its covenants substantially conform to the intention of the parties as expressed in the agreement to make a lease. The lease ought to include all the premises which are mentioned in the agreement and the term and the rental payment must be the same in both writings or the lessee may reject the lease which he must do within a reasonable time after its tender. If from the evidence it appears either that the lessee entered into possession or paid rent under the lease which was delivered him by the lessor, he will be presumed to have waived the objection that the lease did not conform to the agreement. Proof that the lessee was unwilling to accept a lease from the lessor in any form is a waiver of a tender of a proper lease by the lessor.⁷⁸ The lessee usually need not demand the delivery of a

⁷⁶ *Mitchell v. Commonwealth*, 37 Pa. St. 187, 192.

⁷⁷ *Biglow v. Biglow*, 77 N. Y. Supp. 716; *Hill v. Coal Valley Min. Co.*, 103 Ill. App. 46.

⁷⁸ *Freeland v. Ritz*, 154 Mass.

257, 261, 28 N. E. Rep. 226, 26 Am. St. Rep. 244, 12 L. R. A. 561, holding also that the sending of a letter in regard to the contract to the lessees by the lessor and subsequently sending the lease to

proper lease as a condition precedent to bringing his action though it may be safer for him to do so.⁷⁹ On the other hand, a lessor cannot sue on an agreement to take a lease "at a fair rent" until he has tendered to the lessee a lease on such terms unless the lessee by words or action has waived the tender.⁸⁰

§ 190. **The specific performance of an agreement to make a lease.** An agreement in writing to make a lease which complies with the requirements of the statute of frauds will be specifically enforced in a court of equity at the suit of either party to it.⁸¹ The general requirements which are applicable to a suit for the specific performance of a contract in ordinary cases must be complied with. The agreement must contain words from which the court may ascertain the term and the date of its commencement. The premises must be described with a reasonable degree of certainty so that their location may be ascertained by the lessee. There must also be a valid consideration and the agreement, the enforcement of which is desired, must be signed by the party who is to be compelled to execute it.⁸² Where a memorandum of an agreement for a lease was signed by the lessee, but not by the lessor, and the name of the latter did not appear in it, a subsequent letter signed by the lessor and referring to the memorandum will take the case out of the statute.⁸³ An agreement by the lessor to make improvements made at the date of making an agreement for a lease or upon the renewal of a lease is not within the statute of frauds. An agreement by a landlord with a tenant who has land for a term of years, that he will, for a good consideration stated as part of the increased rent, make certain improvements on the land, is valid though not signed by the parties. It is not a contract for any interest in or concerning lands within the statute of frauds.⁸⁴ A landlord or a tenant who seeks the specific performance of an agreement to

them for their signature shows that the lessors substantially performed the contract to execute the lease.

⁷⁹ *Manning v. West*, 6 Cush. (Mass.) 463.

⁸⁰ *Weaver v. Wood*, 9 Pa. St. 220.

⁸¹ *Lenderking v. Rosenthal*, 63 Md. 28, 33.

⁸² *Grand Trunk W. Ry. Co. v. Chicago & E. I. R. Co. (C. C. A.)*, 141 Fed. Rep. 785.

⁸³ *Warner v. Willington*, 3 Drew, 523, 25 L. J. Ch. 662, 2 Jur. (N. S.) 433, 4 W. R. 531.

⁸⁴ *Donellan v. Read*, 3 B. & Ad. 899.

make a lease must show that he has performed all conditions precedent on his part.⁸⁵ A landlord who has agreed to put the property in good repair before the tenant shall execute the lease must satisfy the court that he has done so. A slight variance between the quantity or character of the land as described in the agreement and that set out in the lease may be disregarded. A court of equity will decree the specific performance of a contract for a lease of land where the only defense is that the quantity of land described in the lease is slightly less than that contracted for if the court is satisfied that the defendant would thus receive substantially that which he agreed to lease.⁸⁶ Where the tenant makes an offer to rent a farm at a specified sum per annum, and the landlord accepts the offer and it subsequently appears that the landlord will be unable to deliver possession of the number of acres which the tenant expects to receive, a decree of specific performance will be granted on the suit of the tenant with appropriate abatement of the rent for the actual number of acres delivered. A parol agreement to accept a lease will be specifically enforced in equity where the tenant has entered in pursuance of the parol agreement. The execution of a lease by a lessee will be compelled in equity, where he had agreed to execute one, and the lessor, relying on his promise, broke off negotiations for renting the premises to others, and made material alterations, in order to adapt the premises to the lessee's use. The lessee is estopped under such circumstances, where he had entered into and held possession for nearly half the term, paying the rent agreed upon, but refusing to execute a lease. He cannot abandon the premises and escape liability for the rent upon the plea that no lease had been executed by him.⁸⁸ And as a general rule, where no lease was executed and acknowledged as required by statute, but only a contract for one, still if possession is given under such contract and thereby improvements made by the lessee upon the faith of it, equity will consider the situation of the parties to be the same as if the lease had been executed and so long as possession is retained the rights of the landlord and tenant are

⁸⁵ Counter v. Macpherson, 5 Moore, P. C. 83.

⁸⁶ Bowler v. Electric Light Co., 10 Dec. Rep. 582, 22 Bull. 136.

⁸⁷ McKenzie v. Hesketh, 47 L. J. Ch. 231, 7 Ch. D. 675, 38 L. T. 171, 26 W. R. 189.

⁸⁸ Seaman v. Aschermann, 51 Wis. 678.

to be governed by the terms of the proposed lease.⁸⁹ If it appears on a trial of an action for the specific performance of a contract to make a lease, that the execution of the lease if directed by the court will not benefit the tenant, the court may in its discretion award him damages. This is illustrated where a suit for performance is begun when the term of the proposed lease is nearly expired. Under such circumstances, or where for any other reason the lease would have but a short time to run, the court will not decree a specific performance.⁹⁰

§ 191. **The measure of damages for a breach of an agreement to make a lease.** A mere agreement for a lease as it creates no interest in the land, gives the tenant no remedy against a third person who wrongfully holds possession, but the landlord is liable in damages for the period the tenant is kept out of possession.⁹¹ In an action by a tenant against the landlord for damages for a breach of an agreement to lease, the measure of damages, where there is no fraud or bad faith on the part of the lessor, is the amount paid, or expenses incurred by the lessee in relying on this contract, and if there be no expense or money paid by him, he can recover only nominal damages.⁹² The measure of damages in an action by the landlord against the tenant for damages caused by the breach by the tenant of an agreement to take a lease is the loss of rent while the premises remain unoccupied at the rate proposed in the agreement; and the expense of any repairs or improvements made by the landlord on the premises at the tenant's request and which would not have been necessary to make unless the landlord had expected the tenant to go into possession. In the case of the breach of an agreement to make a lease, the amount of the proposed rent is not the measure of damages where the lease was void under the statute of frauds. The proposed rent is not the measure of damage as under such circumstances the landlord would not receive any rent under the lease, nor can he recover damages for the loss of a bargain as he has lost nothing by a failure to make the lease which, if made, he could not

⁸⁹ Pugh Printing Co. v. Dexter, 8 Ohio Dec. 557, 5 N. P. 332; Pugh Printing Co. v. Dexter, 61 Ohio St. 666; Hannan v. Towers, 3 H. & J. (Md.) 147.

⁹⁰ Cincinnati Southern Ry. Co. v. Hooker, 26 Ohio Cir. Ct. R. 392.

⁹¹ Becker v. De Forest, 1 Sweetney (N. Y.) 528.

⁹² Wolf v. Studebaker, 65 Pa. St. 459.

enforce. He may perhaps recover damages, if, by the making of the agreement for an invalid lease, he was prevented from leasing the premises to some other person or was put to an expense induced by his agreement in altering them or putting material or work upon them which was not necessary for their improvement or repair.⁹³

§ 192. **Letters constituting an agreement to make a lease.** A series of letters passing between the parties may constitute an agreement to make a lease which may be sufficient under the statute of frauds. The letters which constitute the correspondence will be construed together, and, if from all of them taken together it is apparent that the minds of the parties met in an agreement to make a future lease and if the terms including the length of the term and the date from which the term is to commence, can be clearly ascertained from an inspection of the letters the contract will be specifically enforced. Particularly must the commencement and length of the term appear or be ascertainable from a construction of the letters as a whole. It is immaterial in what letter the commencement of the term is stated. It need not be stated in the letter which contains the acceptance of the offer to make the lease. While it is true that an agreement to make a lease may consist of letters, and while it is equally true that, though the commencement of the term may not be contained in a letter of acceptance, it may be supplied from a later letter yet if the later letter is in substance, a rejection of the offer or an acceptance of the offer upon conditions which the party making the offer is not willing to grant, the fact that his letter supplied the date for the commencement of the term, is not material. For where letters are relied upon to constitute a contract of leasing, they must be accepted in their entirety, and the party offering them is not at liberty to use as much of them as may favor his case, and reject that which is unfavorable.⁹⁴ Letters passing between the parties in reference to the assignment of a lease do not constitute a contract in writing which will be enforced specifically where it is clear from an inspection of the letters that the parties meant to make and execute a formal contract at some future date.⁹⁵

⁹³ *Sausser v. Steinmetz*, 88 Pa. St. 324, 327.

affirming 41 L. J. Ch. 551, L. R. 7 Ch. 406, 26 L. T. 568.

⁹⁴ *Nesham v. Selby*, 41 L. J. Ch. 173, L. R. 13 Eq. 191, 26 L. T. 145,

⁹⁵ *May v. Thomson*, 51 L. J. Ch. 917, 20 Ch. D. 705, 47 L. T. 295.

§ 193. **A lease distinguished from a license.** A license may be defined as an authority to do some act or a series of acts on the land of another person without acquiring an interest or estate in the land itself. Whether a contract is a lease or a license will be determined not from what the parties may chose to call it nor from the language used but from the legal effect of its provisions.⁹⁶ Usually as a license is a permission to do some personal act it is presumed to be founded upon the personal confidence which the owner has in the person licensed. Hence,

"I think the decisions of our courts have gone far enough as to letters; that is, in the spelling out of a contract from letters, when both parties intended a formal contract to be executed. I think it very often happens that both parties use expressions in letters which, read alone, would amount to a contract if we did not know that in fact neither of the parties intended those general expressions to constitute a contract. In that case if the court lays hold of the language of the letters to make a contract, it makes a contract for the parties which the parties never intended to enter into. If for instance both parties intended that a lease should be taken from a day to be named, and the one simply said that he would take a lease, and the other said he would grant a lease, without fixing a day, you would be making a new bargain for the parties. If you turn the granting of a lease into an assignment the same intention may be present. It may be an assignment of a lease and the goodwill of a business. Both parties may understand that they are to have a day fixed for the payment of the purchase price and the carrying out of the assignment and that there is to be no final bargain without it, yet, if they do

not state it, the court, it is said, fixes upon the terms and makes them a bargain for a reasonable time to be fixed upon by a jury who may be perhaps not very conversant with the matter. We must always be on our guard against that." *May v. Thomson*, 51 L. J. Ch. 917, 20 Ch. D. 705, 47 L. T. 295. A lease for a term of years is not created by a letter which promises the party to whom it is written a lease for "five years or maybe longer" of the writer's farm if the addressee would move onto it. *Cunningham v. Rinsh*, 157 Mo. 336, 57 S. W. Rep. 769. The owners of a house and shop, in September, 1890, wrote a letter to the person who was then in occupation, in the following terms: "We hereby agree to let you keep peaceable possession of your present house and shop in Strand Lane for a term of 10 years, on condition that you commit no nuisance, and pay us the sum of 9s. 3d. per week for rent thereof. You to pay local board rates, and we to pay poor rates and water rates as hitherto." Held, that there was a demise of the premises for a term of ten years. *Duxbury v. Sandiford*, 80 Law T. (N. S.) 552.

⁹⁶ *Holladay v. Chicago Arc. L. & P. Co.*, 55 Ill. App. Div. 463, 466.

a license is not usually assignable. Thus, for example, the permission given by a land owner to another person to hunt or fish upon his land is merely a license and confers no interest in the land itself nor will it permit the person to whom the license is given to delegate his powers under it to another. The license may be revoked at any time before the licensee has entered upon the land. A land owner may forbid a licensee to go upon the land and if the latter disobey the owner he is then a trespasser. Another fact which distinguishes a lease from a license is that by a license no interest in the land is conveyed while by a lease the tenant is entitled to the exclusive possession and enjoyment of the land from the time of his entry. If the contract gives the exclusive occupation, possession and enjoyment for all purposes to the occupant, the presumption is that the instrument is a lease. This presumption is strengthened by the fact that the owner removes from the land and surrenders possession where he occupied it prior to the contract and by the further fact that the owner refrains from asserting possession or the right to possession during the life of the contract. A contract by which the use, occupation and possession of lands for all purposes not expressly forbidden therein is conveyed, is a lease and not a license.⁹⁷ A contract signed by the owner which does not confer the right to full and exclusive possession upon the other party but which simply gives him a right to enter and to hold possession of land for a particular purpose, as for example, to cut timber or the like, is presumed to be a license. An agreement by which the owner of a building

⁹⁷ *Crane v. Patton*, 57 Ark. 340, 346, 21 S. W. Rep. 466; *Smith v. Simons*, 1 Root, 318, 1 Am. Dec. 48; *Haywood v. Fulmer* (Ind. 1892), 32 N. E. Rep. 574, 18 L. R. A. 491; *Carey v. Richards*, 2 Ohio Dec. 630. In *Crane v. Patten*, 57 Ark. 340, 346, the paper was held to be a lease and not a license because the rights of the lessee were vested and were not determinable at the will of the lessor. The sale of the property during the term would not extinguish the lease if the purchaser had notice of it. By

its terms the lessee had a right to remove a proportionate lot of timber and if the lessor deprived him of this right he was liable in damages for what the timber would have been worth when removed, less the expense of removing it. Nor was it necessary that this act should have been enforced by force or violence. If the landlord prevented the enjoyment of this privilege by inducing the servants of the lessee to leave his employment, he would be liable for damages.

for a consideration, permits a corporation to run electric wires along the walls thereof⁹⁸ which creates a right of way⁹⁹ is a license. So, an arrangement between a father and his daughter by which she is to select such land as she desires and he is to devise the same to her on his death, the daughter at once to enter into the possession and control of the same subject to the right of the father to collect certain rents, is a mere license. The relation of landlord and tenant does not exist between them.¹ The following examples illustrate the general rule and show cases in which upon the particular circumstances, the courts have held that an agreement was a license and not a lease. Thus, an agreement to give a person desk room in an office is usually a license. A person who hires desk room from the tenant of an office or other portion of a building is not himself a tenant. He has merely the right to use a chair and a desk in the office of his lessor while the latter's tenancy lasts. His right of use is at an end with the term of his lessor.² An agreement under seal by which the owner of a farm permits another to live thereon for a term of years in consideration of the latter clearing a part of the same, and putting certain buildings thereon, the owner reserving the use of all the timber except such as may be necessary for the buildings, rails, and fire-wood of the occupant, is not a lease and does not create the relation of landlord and tenant. The occupant is in under a license only, and he has no right to the timber cut on the cleared land, except for the purpose of building, or for fences, or for fire-wood.³ An agreement by which the owner

⁹⁸ *Holladay v. Chicago Arc L. & P. Co.*, 55 Ill. App. 463.

⁹⁹ *Thomas v. McGuire*, 1 Ky. Law Rep. 65.

¹ *Berry v. Potter*, 62 N. J. Eq. 664, 29 Atl. Rep. 323.

² *Swart v. Western Union Telegraph Co.*, 12 Detroit Leg. N. 609, 105 N. W. Rep. 74.

³ *Callen v. Hilty*, 14 Pa. St. 286. "A dispensation or license properly passeth no interest, nor alters nor transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go be-

yond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the act of hunting and cutting down the tree, but as to the carrying away of the deer killed and the tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney, to

of certain machines pays for permission to place the machines in a factory, and for full access to the same for himself and employees, for the purpose of working them, the owner of the factory supplying the steam power, is not a lease nor does the relation of landlord and tenant exist between the parties.⁴ But where the owner of premises lets a certain tenant the portion of a room with steam power for the working of machines at a certain rate for the use of the premises and the power, it is a lease and the owner of the premises may distrain.⁵ An agreement by which a person was vested with the right to use certain moorings on a navigable river, for the purpose of mooring a barge under an agreement with the officials having charge of the preservation of the river, that he would pay certain sums of money, the agreement to be terminated on thirty days' notice, is a license and not a lease.⁶ An agreement between a landowner and a corporation by which the former agrees to prepare his land at his own expense so that it may be used for an athletic ground by the corporation with the provision that the owner is to be compensated for his improvements out of the income is not a lease. The corporation which uses the ground after it has been improved by the owner is responsible for any damages which the owner may be subjected to in being deprived of the use of his property. Inasmuch as the relation of landlord and tenant does not exist, the owner cannot recover for the rental value of his improvement, but the corporation will be liable for the reasonable value of the use of the ground upon the presumption that if it had not been used, the owner might have let it for other purposes.⁷ An agreement by which the lessee of a theatre grants another person the exclusive use of all refreshment bars, smoking rooms and wine

warm him by, as to the act of eating, firing my wood, and warming him, they are licenses; but it is consequently necessary to these actions that my property may be destroyed, the meat eaten, and the wood burnt. So, as in some cases, by consequent and not directly, and as its effect a dispensation or license may destroy and alter property." *Thomas v. Sorrell*, Vaughan, 351.

⁴ *Hancock v. Austin*, 14 C. B.

(N. S.) 634, 32 L. J. C. P. 252, 8 L. T. 429, 11 W. R. 833.

⁵ *Selby v. Greaves*, 37 L. J. C. P. 251, L. R. 3 C. P. 594, 19 L. T. 186, 16 W. R. 1127.

⁶ *Watkins v. Milton*, next Gravesend Overseers, 37 L. J. M. C. 73, L. R. 3 Q. B. 350, 18 L. T. 601, 16 W. R. 1059.

⁷ *Dockstader v. Young Men's Christian Ass'n* (Iowa, 1906), 109 N. W. Rep. 906.

cellars in the theatre together with the exclusive right of advertising in such place for a term of years for a fixed rent is a license. The fact that the agreement contains a stipulation that the lessee of the theatre might put it to an end on non-payment of rent and a covenant of quiet enjoyment does not change it into a lease.⁸ An agreement by which a land-owner in England granted shooting rights over his woods with a yearly rental is something more than a mere license and is not therefore revocable at will. If it be assumed that it is a tenancy, it is one from year to year though perhaps a shorter notice to quit would be required at common law than in the case of a tenancy of farm land. The reason for requiring a six months' notice to quit which exists in the case of a lease of farm land, does not exist in the case of a lease of a right to shoot game over another man's land.⁹

§ 194. Agreement permitting the cutting of timber.

Whether the agreement by one who owns land that another may enter upon it and cut the timber and remove it therefrom is a lease or a contract of sale depends upon the intention of the parties. If the permission to cut timber confers the exclusive possession of the land on which the timber is, upon the person to whom it is granted, it is a lease. And an instrument in writing which confers upon the party accepting the same the ownership of trees and timber on a tract of land may be a lease though no rent is reserved. The contract confers the title to the timber and trees and it is therefore a bill of sale. So far as the land is

⁸ *Edwards v. Barrington*, 85 Law T. 650, 50 Wkly. Rep. 358.

⁹ *Lowe v. Adams*, 70 L. J. Ch. 783; (1901) 2 Ch. 598, 85 L. T. 195, 50 W. R. 37. Other circumstances may arise which will render it important to determine whether a writing is a lease or a mere license. A very familiar example of such a case or class of cases is that of the occupation of a furnished room in a boarding house or hotel, where the question may arise whether the occupant is such under a lease or whether he is a mere licensee. The occupant

or lodger has the exclusive enjoyment of the room, but the owner or his servants have to keep it in order and have a right of entry for that purpose. The actual occupation of the room is therefore in the owner of the hotel or lodging house and the agreement is a license. If, however, the agreement gives the exclusive occupancy of the room or lodgings to the lodger and the landlord has nothing to do with the premises it is very evident that a lease was intended.

concerned it is a lease because it gives the exclusive possession and occupation of the land to the purchaser of the personal property though only for the single purpose of cutting down¹⁰ the timber. Hence, the vendee on his entry upon the land may take possession of the timber which was lying on the land when he entered having been cut down by a trespasser before his entry.¹¹ Assuming that the contract for the sale of standing timber is a lease it follows that it must be certain as to the term. If there is any uncertainty about the duration of the term, as where, for example, the writing does not state the commencement of the term it will be void.¹² A writing which confers no exclusive possession of the land and merely gives the party a right to enter upon it and to remove timber will be regarded as a license. Thus, an agreement which gives the right of cutting and removing some timber in each year which is to be paid for in installments and which agreement is renewable when it expires, is a mere sale of the timber with a license to go upon the land and cut it, though the parties call it a lease. Hence, it follows from this that the relation of landlord and tenant is not created and the owner of the land cannot recover any rent after all the timber has been removed from it.¹³ These rules and principles which we have just stated are applicable with equal force to agreements between the owners of land and other persons who enter upon the land to quarry stone, dig for mineral or bore for oil. Agreements by which land owners permit other persons to enter upon their land and to work mines where they do not involve the exclusive possession of the land itself, are licenses and not leases.¹⁴ But an agreement by which a person who is to mine the coal in land is given the exclusive possession of the land for

¹⁰ *Alexander v. Gardner* (Ky. 1906), 96 S. W. Rep. 818.

¹¹ *Glenwood Lumber Co. v. Phillips*, 73 L. J. P. C. 62; (1904) A. C. 405, 90 L. T. 741, 20 T. L. R. 531.

¹² *Gay Mfg. Co. v. Hobbs*, 128 N. C. 46, 38 S. E. Rep. 26.

¹³ *Crane v. Patton*, 57 Ark. 340, 21 S. W. Rep. 466; *Baird v. Milford Land & Lumber Co.*, 89 Cal. 552, 555, 26 Pac. Rep. 1084.

¹⁴ *Riddle v. Brown*, 20 Ala. 412; *Funk v. Haldeman*, 53 Pa. St. 229; *Caldwell v. Fulton*, 31 Pa. St. 483; *Gillett v. Treganza*, 6 Wis. 343; *Grubb v. Bayard*, 2 Wall. Jr. (U. S.) 81; *Dale v. Wood*, 2 Barn. & Ad. 724; *Wheeler v. West*, 71 Cal. 126, 11 Pac. Rep. 871; *Inhabitants of Town of Rockport v. Rockport Granite Co.*, 58 N. E. 1017, 177 Mass. 246, 51 L. R. A. 779.

a term of years is a lease.¹⁵ So, an instrument is a lease by which the owner of a stone quarry agrees with a person that the latter shall take out the stone and shall sell it, and the owner is to receive a portion of the proceeds.¹⁶ So, also, an instrument which expressly permits a licensee to have the exclusive rights to all gravel and sand for a particular year and excludes all other persons from the premises is a lease.¹⁷

§ 195. **The possession of a tenant under a void lease.** The entry of a person into possession with the owner's consent under a void lease constitutes the relationship of landlord and tenant between the occupant and the owner.¹⁸ A tenancy arises whose duration and general character will depend upon express contract if one is subsequently made; or upon implication created by the conduct of the parties.¹⁹ In the absence of this, such holding is usually regarded as a tenancy at will.²⁰ The payment of rent for a year at the end of the first year or for a month at the end of the first month of the occupation would be strong presumptive though not conclusive evidence of a lease from year to year or from month to month.²¹ Aside from all questions as to the length of the term under such an occupation, it is well settled that the owner may recover in an action of assumpsit from the occupant under the void lease the reasonable value of the use and occupation of the premises.²² And it has also been held that, where the occupant of land or a tenant is in possession under a lease which is absolutely void, the lease cannot be resorted to or considered in evidence to determine the amount which shall be paid by the occupant for use and occupation.²³

¹⁵ Consolidated Coal Co. of St. Louis v. Peers, 150 Ill. 344, 37 N. E. Rep. 937; Caldwell v. Fulton, 31 Pa. St. 475; Harlan v. Coal Co., 35 Pa. St. 287.

¹⁶ Barry v. Smith, 23 N. Y. 129, 1 Misc. Rep. 240, 23 N. Y. S. 261, 69 Hun, 88, 53 N. Y. St. Rep. 57.

¹⁷ Hazwood v. Fulmer (Md.), 32 N. E. Rep. 574.

¹⁸ Brubaker v. Poage, 1 T. B. Mon. (Ky.) 123.

¹⁹ Howard v. Jones, 123 Ala. 488, 26 So. Rep. 129.

²⁰ See ch. —.

²¹ Vinz v. Beatty, 61 Wis. 645, 649, 21 N. W. Rep. 787; Koplitz v. Gustanes, 48 Wis. 48; Laughran v. Smith, 75 N. Y. 206; Huyser v. Chase, 13 Mich. 98.

²² Hays v. Garee, 4 Stew. & P. (Ala.) 170.

²³ Vinz v. Beatty, 61 Wis. 645, 649, 21 S. W. Rep. 787. See, also, Barry v. Ryan, 4 Gray (Mass.) 523, 526, where the landlord suing on a lease whose execution he failed to prove was precluded

§ 196. A lease with an agreement to sell the premises. An instrument may at the same time be a lease and also a contract to convey the premises and enforceable as such by the lessee. This would be the case where land is leased for a term which is specified with a covenant by the lessor that, if the lessee shall pay all the rent under the lease as it accrues, the lessor will at some future date convey the land to the lessee. The promise to convey is specifically enforceable as it is based on a good and valuable consideration, i. e., the payment of the rent by the lessee. Until the day arrives when the lessee has the right to demand a conveyance, the instrument continues to be a lease, the relation between the parties is that of landlord and tenant and the former may oust the latter for the non-payment of rent as in the ordinary cases of landlord and tenant. But after all the instalments of rent have been paid the instrument is no longer executory, but executed; and the parties are no longer landlord and tenant but are vendor and vendee, with a right in the vendee to procure a specific performance of the agreement to convey, including the delivery of a deed in a court of equity as against the owner of the land.²⁴ For an option to purchase contained in a lease does not destroy the relationship of landlord and tenant created by it, until the option is executed. Thus, the fact that a lease contains an agreement by the landlord that he will sell the premises to the tenant for a price agreed on, and that he will accept in part payment, the money which may have been paid as rent, does not make the writing an agreement to sell. The relation of landlord and tenant exists under it, and, where the tenant never pays any rent, the landlord may maintain a proceeding in forcible detainer or other possessory action to oust him.²⁵ Whether an instrument is a lease or an agreement to sell the premises is a question of construction upon all the language of the instrument. The use of the word grant in an instrument conveying an interest in land negatives an intent to create a lease and indicates that a sale was intended. The word is then synonymous with convey and these words may be used

from recovering on an implied contract to pay rent. See use and occupation.

²⁴ *Davis v. Robert*, 89 Ala. 402, 404, 8 So. Rep. 114, 18 Am. St.

Rep. 126; *Thomas v. Johnson* (Ark. 1906), 95 S. W. Rep. 468.

²⁵ *Colored Homestead & Building Ass'n v. Harvey*, 23 Ky. Law Rep. 1009, 64 S. W. Rep. 676.

interchangeably. Hence a grant of a right of way is not a lease of the ground but a conveyance, sale or transfer of an incorporeal easement and where such a grant is made to a railroad over the land of the grant it will conclusively be presumed to constitute a perpetual privilege though provision is made for the payment of an annual rental for a term of years.²⁶ So in conclusion, the character of an agreement in writing by which the occupant of land is to pay a certain sum yearly for its use, is not altered by an agreement that if, within a certain time the amount paid by the tenant equals the principal and interest of a note given by him, he is to have title to the land.²⁷

§ 197. **Lease or mortgage.** The question sometimes arises whether a writing by which the possession of premises is transferred is a lease or a mortgage. In determining this question, the courts will, as in all cases of construction, seek to ascertain the true intention of the parties, and having ascertained this, will seek to put that intention in operation irrespective of the technical language of the instrument. In other words, in determining whether an instrument was meant to operate as a lease or as a mortgage, courts, and particularly courts of equity in which this question most frequently arises owing to the jurisdiction which is exercised in equity over mortgages and trusts will look to the substance and not to the mere form of the instrument. All the circumstances of the case, including the situation and relation of the parties and of the subject matter may be considered by the court,²⁸ for the distinction between a lease and a mortgage of real property is a very clear and important one and the effect and operation of these two instruments quite diverse. In the case of a lease there is carved out of the fee, a more or less lengthy term, but in no case all that the owner possessed or had power to convey, usually with a payment of rent and an estoppel upon the parties to deny the title of each other. In the case of a mortgage, the relation of debtor and

²⁶ Des Moines Co., etc., v. Tubbessing, 87 Iowa, 138, 140, 54 N. W. Rep. 68, in which the court says "we are unable to find a single instance where the word grant is construed as lease."

²⁷ Nobles v. McCarty, 61 Miss. 456.

²⁸ Packard v. Corporation for Relief of Widows, etc., of Prot. Epis. Church in Maryland, 77 Md. 240, 247, 26 Atl. Rep. 411; Montague v. Sewell, 57 Md. 412.

creditor exists and the instrument is executed not like a lease for the purpose of transferring possession, but as security for a debt. The fee is granted absolutely in form, with possession retained in the grantor, and with a proviso that the grant shall be void if the debt shall be paid.²⁹ An agreement by which the owner transfers to another the possession of premises as collateral security for a debt with power to receive and use the rents and profits until a certain date, though in form a mortgage, is in effect a lease and creates the relation of landlord and tenant. It is not material that the instrument contains no operative words of grant or demise. The instrument transfers the possession and the owner divests himself of the possession and transfers it to another who being thereby his tenant, holds in subordination to the owner's title. The latter may collect the rents but must account for them to the owner.³⁰ An owner of land who mortgages it under an agreement that he shall remain on it and cultivate it, paying the mortgagee a certain sum each year, the surplus of which over the interest and taxes is to be applied to pay off the mortgage debt, is not a tenant of the mortgagee. It is not material that the payment is called rent.³¹ An agreement by the owner of the premises that a mortgagee may occupy it until the mortgage is paid creates the relationship of landlord and tenant between the parties. The term expires by the payment of the mortgage at any time though it may not be due.³² A deed of premises with a defeazance endorsed thereon providing for a reconveyance to the grantor upon the latter paying a certain sum named therein as well as for the use of the farm, the grantor to have the use of the premises until the sum is paid, is a mortgage and not a lease and the parties do not occupy the position

²⁹ In some sections a ground rent redeemable at a definite future date is a common security for money loaned, the rent paid being the interest which is due. Nevertheless this is a lease, not a mortgage, for though the lessee purchases his estate with the privilege of his buying the fee at some fixed future date at a fixed price, yet he is not compelled to do so and if he does not do so, the lessor

has no cause for complaint so long as the lessee shall pay the rent. *Packard v. Corporation, etc.*, in Maryland, 77 Md. 240, 247, 26 Atl. Rep. 411.

³⁰ *Wells v. Sheerer*, 78 Ala. 142, 145.

³¹ *Sadler v. Jefferson* (Ala. 1906), 39 So. Rep. 380.

³² *Hunt v. Comstock*, 15 Wend. (N. Y.) 665.

of landlord and tenant. Nor does the provision in the deed relative to the grantor paying the grantee for the use of the farm make the former a tenant of the latter, nor change the character of the instrument from a mortgage to a lease.³³ A clause in a lease of real property reserving to the lessor a lien for the rent on the goods and chattels of the lessee placed on the premises, to be enforced on the non-payment of rent, as in case of a chattel mortgage, by the taking possession and the sale of the property is, in its effect and nature, a chattel mortgage, in equity at least. Hence, for such an instrument to constitute a valid lien binding on an innocent purchaser of the chattels, it must be recorded under the statute as a chattel mortgage.³⁴ An instrument purporting to be an indenture which is in its form and language a lease, but which recites that the lessee has paid the rent for the term in full and that he will reconvey upon the repayment of said sum by the lessor, is a mortgage under the general rule that any instrument conveying an estate in land and stipulating that the same shall be re-conveyed on the payment of money, is a mortgage. The relation between the parties to this instrument is therefore that of mortgagor and mortgagee. The mortgagee being in possession and receiving the rents and profits must, on redemption, account therefore as payment first to keep down the interest and then to credit upon the principal. If the money to be paid by the mortgagor is paid during the term, the condition is not broken and the mortgagor may regain his possession. If the money is not so paid the condition is broken in law and the mortgagor has then only an equity of redemption and must bring an action to redeem his equity in order to obtain possession. As soon as the rents and profits received by the *quasi* lessee equal the debt, the latter is at once regarded as paid and the mortgagor's right of entry is complete. If the rents and profits exceed the debt, the balance in equity belongs

³³ *Graham v. Way*, 38 Vt. 19; *Halo v. Schick*, 57 Pa. St. 319, 25 L. J. 332.

³⁴ *Mitchell v. Badgett*, 33 Ark. 387; *Merrill v. Ressler*, 37 Minn. 82, 33 N. W. Rep. 117, 5 Am. St. Rep. 822; *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574; *McCaffrey v.*

Woodin, 65 N. Y. 459, 22 Am. Rep. 644; *Reynolds v. Ellis*, 34 Hun, 47; *Nestell v. Hewitt*, 19 Abb. N. C. 282; *Betsinger v. Schuyler*, 46 Hun, 349; *Greeley v. Winsor*, 1 S. D. 117, 45 N. W. Rep. 325, 39 Am. St. Rep. 349.

to the lessor who may recover the same from the lessee by an action in assumpsit for money had and received.³⁵ A creditor who occupies and retains possession of the lands of his debtor until from the rents and profits he shall have received a sum sufficient to pay his debt is, from the date of taking possession, the tenant of the debtor, he is liable to the debtor for the rent which accrues after the debt shall have been paid, and the debtor may, upon a failure to pay the rent, institute and maintain dispossessory proceedings.³⁶

§ 198. **The lease of space in a department store.** In modern times it is quite common, in the large cities particularly, for a portion of a building to be sub-let and this rule finds frequent illustration in the sub-letting of floor space by the proprietor of a so-called "department store" to a merchant who wishes to carry on a particular line of business in connection with other departments in the same building. Whether such an agreement is a lease or a mere license is to be determined by the general rules elsewhere stated.³⁷ If the lessee is to have the exclusive possession and enjoyment of particular floor space to the exclusion of the lessor, the agreement is a lease and the rules of law which are applied to the relation of landlord and tenant, regulate the contract of the parties. As a general thing, the value of a lease of this character to the tenant lies not so much in the area of floor space which he occupies as in the opportunity afforded him to dispose of his goods. Of course, this opportunity depends largely, if not wholly, upon the number of people who frequent the store and with whom he will be brought in contact by reason of his presence in the store. Hence, the representation of the lessor as to the number and character of the customers who patronize his establishment, the amount he may have spent in advertising, the number of years he has been established in business, the amount of his sales and general facts relating to his past business standing are material. And if there are any misrepresentations by the lessor in reference to these facts, the lease may be set aside³⁸ as having been procured by fraud and deceit.

³⁵ *Nugent v. Riley*, 1 Met. (Mass.) 117, 121, 35 Am. Dec. 355. ³⁸ *Ehrich v. Winter & Co.*, 103 N. Y. Supp. 1023, 52 Misc. Rep.

³⁶ *Wells v. Sherer*, 78 Ala. 142. 641.

³⁷ Sec. 193.

§ 199. A lease distinguished from a contract to furnish board and lodging. In many cases it becomes of importance to distinguish between the *status* of a lodger and that of a tenant and to answer a question whether one who occupies premises with the consent of the owner is a lodger or a tenant of the owner. The lodger is defined by the cases to be one who has only a right to inhabit another man's house. He has no rights of a tenant and usually is not entitled to the same remedies. A lodger is a mere licensee whose right to occupy is revocable and who has no exclusive right to the occupation or possession of any part of the premises. Sometimes board is supplied with the lodging and a boarder is one who has food or diet, either with or without lodging, in another man's house, for compensation. Whether an occupant of premises is a lodger or a tenant depends on the circumstances of the case. For example, where a person contracts with the keeper of a hotel for rooms and board, whether for a week, for a year or for any other certain period, the relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the land and has no right to an exclusive possession. If he is turned out of the rooms before his time expires, he cannot maintain ejectment or trespass. And while he remains as a lodger the landlord cannot collect rent in arrears by distress.³⁹ If the arrangement between the parties is a lease and not a mere contract to supply board and lodging, the rights and remedies of the parties as against each other are very different. So, if the occupant is a tenant and not a mere lodger, the agreement between him and the landlord is a lease, being a conveyance of an interest in land or concerning land, and where it is for a term of more than a year must usually be in writing under the statute of frauds. On the other hand, if the occupant of the premises is a mere boarder or lodger and not a tenant, then his contract is not a lease but merely an agreement to furnish board and lodging or lodging only according to the circumstances and it need not be in writing.⁴⁰ Thus an agreement to pay a certain sum yearly for the board and lodging of two persons in a boarding house, which agreement is terminable on a quarter's notice by either party is not an agreement for an

³⁹ *Wilson v. Martin*, 1 Den. (N. Y.) 602.

⁴⁰ *White v. Maynard*, 111 Mass. 250.

interest in real estate and hence it is not within the statute.⁴¹ Nor does it signify that such a contract is concerning an interest in land because it expressly points out and designates the particular apartment or room which the lodger is to occupy. The technical relation of landlord and tenant is not created between the parties by a contract which obligates the owner or occupant of premises to furnish rooms and board whether for a week, month, year or longer period and the lodger cannot maintain ejectment if he is turned out of possession before his term is at an end nor can the hotel keeper distrain for rent in arrears.⁴² On the other hand, it has been held that an agreement to take a certain apartment or rooms in a house as lodgings at a yearly rent was within the statute of frauds.⁴³ And it is obvious that, if such be the intention of the parties clearly evidenced by their language or actions, an entire floor, an apartment, a series of rooms, or even one room may doubtless be let for lodgings so separated from the rest of the premises and so completely surrendered to the exclusive control and possession of the lodger as to become in law and fact his separate tenement and he will under such circumstances be a lessee.⁴⁴ A contract which in its terms purports to be a lease and which confers the right to an exclusive occupation upon the occupant of certain particular rooms specified, for a precise time and at a definite weekly rate, such rooms being so separated from all other rooms in the house as to become in fact and in law a separate tenement, is a lease and not a contract for board and lodging. The fact that, on leasing the rooms, the lessor also agrees to furnish food to the occupant and to his family is not material.⁴⁵ The executors of the lessee who dies during the term, are bound for the full term, but the lessee's death diminishes the actual amount which may

⁴¹ *Wright v. Stavert*, 2 E. & E. 721, 727.

⁴² *Wilson v. Martin*, 1 Denio (N. Y.) 602.

⁴³ *Inman v. Stamp*, 1 Stark. 12; *Edge v. Stafford*, 1 Tyrwh. 293, 1 C. J. 391. There is, however, nothing in the reports of these cases to show that the premises were in a lodging house, and the agreement in each case appears to have

been such that, if an entry had been made, it would have amounted to an actual lease of the rooms.

⁴⁴ *White v. Maynard*, 111 Mass. 250, 254; *Newman v. Anderton*, 2 B. P. N. R. 224; *Fenn v. Grafton*, 2 Bing. (N. C.) 617, 3 Scott, 56; *Monks v. Dykes*, 4 M. & W. 567; *Swain v. Mizner*, 8 Gray (Mass.) 182.

be recovered thereunder to the extent of the actual cost of boarding her during the remainder of the term after her death.⁴⁶ So, also, the fact that the lessor imposes certain restrictions upon the lessee as to the manner in which the rooms are to be occupied and used, does not alter the character of the contract, as it is still a lease.⁴⁷

§ 200. Agreement to board and care for the owner of land.

An agreement to board the owner of land under which the party who agrees to furnish the board, enters into possession of the whole or of a portion of the premises may or may not be a lease according to the circumstances. The presumption is against such a contract being a lease and this presumption is very materially strengthened by proof that the owner of the land continues in its possession and control after the entry of the other party. Another material fact is that the occupation is not for a cash rent. Thus, an agreement by which one enters upon the occupation of premises in part and while there, furnishes board to the owner, who continues to occupy the remainder of the premises upon a promise by the owner that he will devise the property to the person who is boarding and caring for him, is not a lease. The relation of landlord and tenant does not exist between the parties and the party furnishing the board has his remedy upon

⁴⁵ *Oliver v. Moore*, 53 Hun, 472, 6 N. Y. Supp. 413, affirmed in 131 N. Y. 589, 30 N. E. Rep. 65.

⁴⁶ *Oliver v. Moore*, 53 Hun, 472, 6 N. Y. Supp. 413, 25 N. Y. St. Rep. 37. See, also, *S. C.*, 39 N. Y. St. Rep. 500, 35 N. Y. St. Rep. 131.

⁴⁷ *Porter v. Merrill*, 124 Mass. 534, 541. See *White v. Maynard*, 111 Mass. 250. In *Fludier v. Lombe*, *Cas. Temp. Hardw.* 307, Lord Hardwick said: "A lodger was never considered by any one as an occupier of a house. It is not the common understanding of the word; neither the house, nor even any part of it, can be properly said to be in the tenure or occupation of the lodger." And this definition was cited with approval in *Cook v. Humber*, 11 C.

B. (N. S.) 33, 46. So, too, in those English cases where the question has arisen under the English valuation and tax acts whether an occupant of a house was a tenant or a mere lodger it has been held that there must be an actual placing of a person in the exclusive possession of a house or an apartment in a house by the landlord to make him a lessee and that merely admitting one as an inmate, the landlord retaining the legal possession and control of the whole house, constitutes him a lodger only. *Smith v. St. Michael*, 3 E. & E. 383; *Stamper v. Overseers of Synderland*, L. R. 3 C. P. 388; *The Queen v. St. George's Union*, L. R. 7 Q. B. 90.

the contract which has been made to devise him the property.⁴⁸ Under an agreement of this kind an owner cannot enforce the remedies which a landlord generally possesses. Thus, an agreement that one shall remain in a house, shall board the owner and keep the house in repair during the owner's pleasure is not a lease; and the owner, not being a landlord, cannot maintain a summary proceedings under the statute to oust the other party as his tenant.⁴⁹ An agreement by a daughter binding herself to board her father several months in each year under which she takes possession of her father's farm and remains there is not a lease.⁵⁰ But an agreement by which one of two tenants in common agrees that he will furnish a home and support the other in consideration of his having the whole portion of the land is a lease.⁵¹

§ 201. Entry upon land of another under an option to purchase from him. A tenancy does not arise by implication of law between the owner of land and a person to whom he has given an option to purchase the land at a fixed price and within a certain time merely because the person having the option enters on the land to prospect for minerals or for any other purpose during the continuance of the option; but if he remains in possession at the expiration of the time without right he becomes a trespasser.⁵² Hence neither the owner who has given the option nor his successor in interest can eject such person as a tenant at sufferance either during the continuation of the option or after its termination.⁵³

§ 201a. The mortgagee of the tenant's chattels in possession. The holder of a mortgage upon personal property which is in the demised premises who takes possession of the mortgaged property and of the premises with the consent of the mortgagor who is a lessee and is permitted to sell the goods and apply the proceeds to the payment of the mortgage debt is not liable for rent to the lessor of the mortgagor. The mortgagee may under

⁴⁸ *Matthews v. Matthews*, 49 Hun, 346-348, 2 N. Y. Supp. 124.

⁴⁹ *Schreiber v. Goldsmith*, 70 N. Y. Supp. 236, 35 Misc. R. 45, 104 N. Y. St. Rep. 236.

⁵⁰ *Story v. Epps*, 105 Ga. 504, 31 S. E. Rep. 190; *Herrel v. Sizeland*, 81 Ill. 447.

⁵¹ *Shouse v. Krusor*, 24 Mo. App. 279.

⁵² *Henry v. Perry*, 110 Ga. 630, 36 S. E. Rep. 87.

⁵³ *Henry v. Perry*, 110 Ga. 630, 36 S. E. Rep. 87.

such circumstances make himself liable for rent to the lessor by an agreement either express or implied. Until he does so he is only an occupant under the lessee, being in fact merely the agent of the lessee for the sale of the mortgaged goods and the application of the proceeds to the mortgage debt. The lessee continued to receive the benefit of the occupation of the premises and he must pay the lessor for the same. If, however, the mortgagor shall vacate, leaving the mortgagee in possession, and the mortgagee pays rent to the lessor, the mortgagee may justly be regarded as the assignee of the lease and is liable as such.⁵⁴ Chattel mortgagees who before they take possession of personal property in demised premises promise a lessor to pay rent will be liable for rent while they continue in possession for the purpose of selling the goods. Subsequent litigation brought by the mortgagor involving the enjoining of the sale and the appointment of a receiver in an action to set aside the mortgages do not relieve the mortgagees from liability for rent during the time the action is pending. It is the duty of the chattel mortgagees to apply to the court in such a suit for an order relieving them from liability for rent or to consent promptly to the appointment of a receiver who would then become responsible for the care of the goods. Having failed to do this, the mortgagees of the chattels are in the position of assignees of the lessee and they are liable to the lessor for the rent stipulated to be paid by the lease and not for use and occupation merely. Nor can they avoid their liability by proving that the lessor took no proceedings to oust them from possession or to compel them to remove the mortgaged goods. A court of equity will on application of the lessor, direct that the rent for which the mortgagors are responsible, shall be paid out of the proceeds of a sale by the receiver though the mortgages are decreed to be valid.⁵⁵ In conclusion, a chattel mortgagee who purchases the mortgaged chattels, the sale being made subject to the landlord's lien, and thereafter enters on and occupies the premises, will be liable for use and occupation to an assignee of the lessee whom he keeps out of possession as well as to the lessor on the covenant to pay rent.⁵⁶

⁵⁴ *Fisher v. Pforzheimer*, 93 Mich. 650, 653, 53 N. W. Rep. 828. ⁵⁶ *Bolton v. Lambert*, 72 Iowa, 483, 34 N. W. Rep. 294.

⁵⁵ *Hatch v. Van Dervoort*, 54 N. J. Eq. 511, 34 Atl. Rep. 938.

§ 202. **Future lease of an unfinished building.** There can be no question as to the validity of an agreement to execute a future lease of an unfinished building. Whether the completion of the building shall be a condition precedent to the execution of the lease usually depends upon the exact wording of the contract. Where it has been agreed between the parties that a lease is to run from the completion of a building which is in course of construction, and it is stated in the lease, or in the agreement for the lease, that the building is to be completed on a certain date, the latter statement is not a covenant that the building will be completed on that date.⁵⁷ A contract cannot properly be called a lease where the premises referred to in the same are not in existence when it is executed and the lessor named therein does not own the land. It is rather a contract to build with an agreement for a future lease to begin as soon as the building is ready for occupancy. If the lessee so-called shall enter into possession and shall occupy the building before it is complete, he becomes responsible for rent during his occupancy. He will be presumed to have waived his right to be released from his covenant to enter or to pay rent. If by reason of the delay in completing the building he has suffered any damages, he may recoup them in an action against him for rent, to the extent of the rent, and if they exceed that amount he may recover the excess.⁵⁸ An agreement by which the owner of land agrees to erect a building on it according to plans and specifications to be finished on a certain future date with rent to begin when the building is complete is a lease *in presenti* with possession postponed to a future date. The mere fact that there is no certain and fixed date expressly mentioned in the lease on which the term is to begin does not invalidate such a lease because the term is not definite and certain. It is sufficient if the agreement shall specify when the building is to be completed and shall at the same time state that the lessor may have possession when the

⁵⁷ *Noyes v. Loughhead*, 9 Wash. 325, 328, 37 Pac. Rep. 452.

⁵⁸ *Haven v. Wakefield*, 39 Ill. 509, 518, 519. A contract which provides for the letting of a building in course of construction from the date of its completion, the prospective lessor then having

no title, is a lease where it does not in terms provide for the subsequent execution of any other instrument and the tenant entered on the completion of the building. *Western Boot and Shoe Co. v. Cannon*, 50 Mo. App. 642.

building is completed. The right of the tenant accrues on the date the building is completed. He may then maintain ejectment against an intruder and, on the other hand, he is thereafter responsible to the landlord for the rent.⁵⁹ But he is not liable to pay rent unless the building which has been erected substantially complies with the plans and specifications. He may show this in an action against him for the rent. He may also show that parts of the building as to which there were no plans and specifications have not been constructed in a reasonably safe and workmanlike manner for the known purpose for which the building was meant to be used. If the building is not substantially adapted to his purpose, the tenant is not liable for rent if he refuses to enter when it is completed. He need not show that the building is entirely unsafe or in danger of falling down or actually unsafe for every purpose if it be unsafe for the known purpose for which it was intended to be used.⁶⁰

§ 203. **Mortgagor or his tenant and a purchaser at a sale under foreclosure.** A purchaser of premises which have been sold under a foreclosure does not thereby become the landlord either of the owner of the equity or of tenants holding under leases from such owner, at least where the leases are dated subsequently to the date of the mortgage. The term granted by the lease after the mortgage has been executed is carved out of the equity of redemption and is therefore subject to all the incumbrances which are then upon the equity. The purchaser at the mortgage sale becomes the owner of the fee subject to such incumbrances only as were liens prior to the execution of the mortgage. He may accept as his tenants, persons who lease subsequent to his lien even without an actual attornment or he may

⁵⁹ Colclough v. Carpeles, 89 Wis. 239, 247, 61 N. W. Rep. 836. See Bacon v. Bowdoin, 22 Pick. (Mass.) 401, where an agreement to complete a building and furnish water power by a future day was held a lease. Bussman v. Ganster, 72 Pa. St. 285, in which Sharswood, J., says: "It is true, here are no formal words of demise, but it is very manifest that after the erection of the building

there was created a term of years in the premises, with a certain commencement and a certain termination; in short, with all the requisites of a lease." See, also, as to leases for terms to begin *in futuro*. Chapman v. Bluck, 4 Bing. (N. C.) 187; Trull v. Granger, 8 N. Y. 115, 118; Becar v. Flues, 64 N. Y. 518, 520.

⁶⁰ Colclough v. Carpeles, 89 Wis. 239, 248, 61 N. W. Rep. 836.

treat them as trespassers, and may recover possession from them by ejectment or an action of forcible detainer at law or by a writ of assistance according to the local practice.⁶¹ Where the purchaser at a foreclosure sale evicts the tenant of the mortgagor who is subsequent to the mortgage, the tenant is not entitled to emblements.⁶² On the other hand, the purchaser at foreclosure cannot distrain for subsequent or prior rent or sue the tenant of the mortgagor holding over for subsequent or prior rent,⁶³ or for use and occupation,⁶⁴ unless the tenant shall have attorned to him and he accepted him. So it has been held that a mere notice by the purchaser at foreclosure to a tenant to pay rent to him which the latter does not act upon does not make the tenant liable for the rent. For if the tenant does not attorn to the purchaser there is no privity between them from which the relation of landlord and tenant may be implied. But the relation of landlord and tenant is created where after a sale under a foreclosure, the purchaser at the sale agrees with the former owner of the mortgaged premises that the latter may remain in possession, paying him rent for two years after the expiration of the time to redeem, with an extension of the right to redeem during the years.⁶⁵

§ 204. **Contracts for advertising space.** Agreements by which the owner of land permits another person to place an advertising sign upon it are becoming more common in modern times. In many cases the agreement permits the person desiring

⁶¹ Downard v. Groff, 40 Iowa, 597, 599; Gilman v. Wells, 66 Me. 273; Lane v. King, 8 Wend. (N. Y.) 584; Jones v. Thomas, 8 Blackf. (Ind.) 428, 431; Reed v. Bartlett, 9 Ill. App. 267; Bartlett v. Hitchcock, 10 Ill. App. 87; Peters v. Elkins, 14 Ohio, 344, 347; Sprague Nat. Bank v. Railroad Co., 48 N. Y. Supp. 65, 22 App. Div. 526; McKircher v. Hawley, 16 Johns. (N. Y.) 289.

⁶² Jones v. Thomas, 8 Blackf. (Ind.) 428, 431.

⁶³ Reed v. Bartlett, 9 Ill. App.

267, 271; Rogers v. Humphreys, 4 Ad. & El. 299.

⁶⁴ Peters v. Elkins, 14 Ohio, 344, 347.

⁶⁵ Eldridge v. Hoefer, 45 Oreg. 239, 77 Pac. Rep. 874. A tenant of a mortgagor by a lease made subsequently to the lien of the mortgage does not thereby become a tenant of the mortgagee (Bridwell v. Bancroft, 2 Ohio Dec. 697), or of his assignee (Jackson v. Rowland, 6 Wend. (N. Y.) 666, 22 Am. Dec. 507), in the absence of an attornment or express agreement to that effect.

to advertise to erect or build a wooden sign upon vacant land. The placing of the sign involves the erection of a more or less permanent wooden structure which is fastened to the land and which occupies more or less space upon it. The making of such a contract creates by implication a license on the part of the landowner for the other party to the contract to enter upon his land for the purpose of erecting the structure and thereafter from time to time to enter upon it for the purpose of caring for and maintaining it. It therefore follows that while the sign is on the land there can be no trespass where the entrance is solely for the purpose of carrying out the contract. In other cases the sign is placed or erected upon a building, sometimes being painted upon the roof, or upon a wooden structure built upon the roof, and sometimes being painted on the walls on the front or sides of a house. The question often arises between the owner and the other party to the contract whether such a contract is a lease or a license. Where there is an actual occupancy and possession of the land or of a portion of the premises which excludes the landlord from his possession of that portion, the agreement would be a lease. Thus, an agreement by which a person is to have the use and the possession of a roof for advertising purposes, in order to get the benefit of which he must build and maintain a wooden structure upon the roof, is a lease and not a license.⁶⁶ So, it has been held that the hiring of an outer wall of a building for the purposes of painting advertising signs thereon is not a license for the use of the wall but it is a lease. It involves the exclusive possession of the outside of the wall. The relation of the landlord and tenant is created between the owner of a wall and the advertiser.⁶⁷ Similar agreements have also been held to be licenses. Thus, an agreement by a lessee of a floor in a building to permit a third party, in return for an annual payment to him, to hang a sign on the outer wall of the premises is a license for the reason that it is merely a permission to do a particular act upon the premises. The court held it was a license because it was not a conveyance of the outside wall for all purposes. Hence this contract not being a lease the granting of this permission was not a breach of a cove-

⁶⁶ *Pocher v. Hall*, 98 N. Y. Supp. 754.

⁶⁷ *Oakford v. Nirdlinger*, 196 Pa. St. 162.

nant by the lessee not to underlet.⁶⁸ An agreement by which the owner of property permits another person to place a bill-board and advertising station on his land, which is not to touch or be fastened to the wall of the premises and for which the person receiving the privilege is to pay an annual rent, is not the lease of the land, though rent is spoken of. The agreement is a mere license, and it may be revoked by the owner of the land on a reasonable notice. Having in view a quarterly payment of rent, the court held a three months' notice sufficient.⁶⁹

§ 205. **A purchaser of a crop on an execution sale of a tenant.**

One who purchases at an execution sale a crop growing on land does not necessarily thereby become a tenant of the owner of the land. The relation of landlord and tenant does not exist between the purchaser of the crop and the owner of the land in the absence of an express agreement to that effect between the parties.

⁶⁸ *Lowell v. Strahan*, 145 Mass. 1, 12, 13, 12 N. E. Rep. 401, 1 Am. St. Rep. 122.

⁶⁹ *Wilson v. Tavener*, 70 L. J. Ch. 263; (1901) 1 Ch. 578, 84 L. T. 48. The case of *Pocher v. Hall*, 98 N. Y. Supp. 754, draws a clear distinction between the construction and maintenance of an advertiser's structure in reference to signs placed upon the wall. Thus, a lessee of a building is not authorized to let out the roof for advertising purposes, though he has a right to sublet other portions of the building. *O. J. Gude Co. v. Farley*, 28 Misc. Rep. 184, in which the court said the purpose of a roof of a building is primarily to shelter it and all of its occupants, and the tenant of the top floor has no better title to the roof or better right to its use for any other purpose than shelter than has the tenant of any other floor. His right to use the roof over him is like his right to use the supporting walls of the foundation when that is essential to

the safety and quiet enjoyment of his premises. And any extension of that right must be by agreement with or license from the owner. The court further held that a subsequent owner of the premises might remove the signs placed on the roof by the advertising company with the permission of the tenant without being liable for trespass. Where a paper, though called a lease, merely permits the person to go on the roof of a building and to place advertisements upon a structure already erected, and conveys no interest or any right of possession in it and the sign on which the advertisement was to be placed had been erected some time before the contract was executed, it is not a lease but a license. The advertiser cannot be held liable for the result of personal injuries where the sign board was blown down into the street by the wind. *Reynolds v. Van Benren*, 155 N. Y. 120-123, 49 N. E. Rep. 763, 42 L. R. A. 129.

All that the purchaser gets is the right to remove the crop with the privilege of ingress and egress to remove it which makes him a licensee and not a lessee. He is entitled to a reasonable time after the crop has matured to harvest it and to remove it and these rights and privileges he enjoys without liability on his part for the reasonable value of the use and occupation of the land.⁷⁰

§ 206. **The judgment debtor holding over after a sale on an execution.** There is no implied promise on the part of a judgment debtor holding over after the sale of his land under an execution, to continue as a tenant of the purchaser at the execution sale. Hence there arises no implication of any contract of lease between him and the purchaser on the execution and, as the relation of the landlord and tenant is based on contract express or implied, no tenancy exists by implication from the execution debtor holding over. He is then merely a trespasser who may be ousted at any time by the purchaser on the sale and from whom, at the same time, no rent can be collected by the purchaser for the period he remains in possession.⁷¹ If however the purchaser permits the judgment debtor to continue in possession, and *a fortiori*, if knowing who he is, he receives rent from him while he holds over, the relationship of landlord and tenant arises between the parties and a tenancy at will is created, unless some specific term shall be agreed upon by them.⁷²

§ 207. **Whether an instrument is a lease or a partnership agreement.** It sometimes becomes important, in view of the difference which in law exists between the reciprocal rights and

⁷⁰ *Raventas v. Green*, 57 Cal. 254; *McClellan v. Krall*, 43 Kan. 216, 218, 23 Pac. Rep. 100; *Cradock v. Riddlesbargar*, 2 Dana (Ky.) 205; *Coombs v. Jordan*, 3 Bland Ch. (Md.) 284, 22 Am. Dec. 260; *Hartwell v. Bissell*, 17 Johns. (N. Y.) 128; *Brittain v. McKay*, 35 Am. Dec. 738; *Smith v. Tritt*, 28 Am. Dec. 565; *Whipple v. Foot*, 2 Johns. (N. Y.) 418.

⁷¹ *Tucker v. Byers*, 57 Ark. 215, 21 S. W. Rep. 227; *Griffin v. Rochester*, 96 Ind. 545; *Chalfin v. Malone*, 9 B. Mon. (Ky.) 496. In *Siglar v. Malone*, 3 Humph.

(Tenn.) 16, and *Wood v. Turner*, 7 Humph. (Tenn.) 517, it was held that one who is in possession when land is sold by virtue of a decree in chancery or under an execution at law is a *quasi* tenant of the purchaser at least to the extent of being estopped to deny the title of the purchaser. See, also, to same effect, *De Silva v. Flynn*, 9 Civ. Pro. Rep. (N. Y.) 426.

⁷² *Munson v. Plummer*, 59 Iowa, 120, 12 N. W. Rep. 806; *Jackson v. Sternbergh*, 1 Johns. Cases, 153.

duties of partners and those of landlord and tenant, to determine whether a writing is a partnership agreement or a lease. On this question no general rule can be laid down for each case is a law unto itself to be determined according to the intention of the parties to be gathered from the contents of the writing and the circumstances of the parties and of the subject matter. That the writing describes the parties to it as partners is not conclusive if it is otherwise apparent that a lease was intended. So, an instrument which recites that the parties to it are partners in business and that they as such own a building but which furthermore provides that one of them is to take charge of and run the property as a hotel for a term of years and to pay to the firm at the end of each year a fixed sum is a lease for a term of years and not a partnership arrangement, terminable by either party. This is apparent not only from the fact that the entire possession is transferred to a lessee but also because there is no provision for a division of either profits or losses. Hence the fact that the landlord supported a statute passed after the leasing by the enactment of which the profits of the hotel are greatly diminished is no breach of the lease entitling the tenant to ask for a rescission as he took the lease subject to regulation by the legislature.⁷³ An agreement which provides that the occupant of certain premises is to pay as rent to the owner one half of the profits resulting from the occupant carrying on a business in the said premises is a lease and not an agreement of partnership. Leases providing for the payment of a share of the profits as rent are by no means uncommon. The fact that the agreement does not provide for a division of the losses, if any, between the parties is not always material. And the presumption that such a writing constitutes and was intended by the parties for a lease, and not as an agreement for a partnership would be rendered almost, if not altogether, conclusive, by the fact that it speaks of a yearly rental to be paid, provides for a renewal when it expires and confers on the occupant the right to assign the leasehold interest.⁷⁴ A writing which purports to be in form at least a lease, and which confers upon the lessee so-called, the entire control of a factory together with the right to employ and to discharge persons working there, reserving to the owner of the

⁷³ *Baughman v. Partman*, 14 S. W. Rep. (Ky.) 342.

⁷⁴ *Z. C. Miles Co. v. Gordon*, 8 Wash. 442, 36 Pac. Rep. 265, 267.

premises no powers as to the management of the business but stipulating that the profits of the business exceeding a certain amount shall be paid to the party owning the factory and plant creates the relation of landlord and tenant and not that either of partners or of principal and agent.⁷⁵ So, an agreement for one year by which, in consideration of receiving one half of the crop, the owner of land permitted another to occupy it, each party to furnish one half the stock and seed, and the lessee to supply the farming implements and the labor and also to pay the taxes, and to account at intervals for all receipts and expenditures, is a lease, and not a partnership agreement.⁷⁶ From the cases cited it may be gathered that a division of the profits between owner and occupant is of very little weight as raising a presumption of a partnership where the division is made in lieu of paying rent. For the money thus paid to an owner though it may be called a share of the profits is in reality rent. The amount may fluctuate but its character as rent remains fixed. And money paid and received as rent does not lose its character as rent because the parties to the payment chose to call it a division of partnership profits. The real test in all of these cases lies in the answer to the question in whose control is the premises? And the fact that the occupation, enjoyment and control of the premises are wholly surrendered by one party and exclusively vested in the other goes a long way to convince one that a lease was intended.

§ 208. **Contracts for steam heating and for steam and water power.** Agreements by which owners of premises stipulate to furnish persons who are their tenants with a stipulated steam power are very common and may with some propriety be called leases. Regarding them as leases, the general rules of construction of leases apply. Some special rules growing out of the use of steam for power and out of the character of the means by which it is generated and supplied must also be considered. In construing a lease of steam power in connection with a lease of the premises, the court will consider the previous condition of the premises under the general rule that a grant will be con-

⁷⁵ *Ault v. Wooden-Ware Co.* 113, 8 W. N. C. 475, 37 L. I. 300, Baker, 26 Ind. App. 374, 58 N. E. 12 Lanc. Bar. 41, affirming *Brown v. Jacquette*, 1 Del. Co. 297.

⁷⁶ *Brown v. Jaquette*, 94 Pa. St.

strued by considering the condition of things which were in the minds of the parties when it was made. Hence, where a landlord in leasing premises which required the use of steam power for their full enjoyment confers on the tenant the right to use half the power of "the then present therein located steam engine," it is competent for the lessee to show his prior occupancy of the premises and his manner of the former use of the power supplied by the engine. The fact is that the lessor when executing the lease actually knew these facts and therefore contracted with them in view. And where the lessee had used the exhaust steam after it had furnished him power and it was absolutely necessary for his business for him to continue to do so a right to use it will pass under "appurtenances" where the "steam power" only is demised.⁷⁷ Where a lessor is bound to furnish the necessary power to run the lessee's machinery, as it was furnished when the lease was executed, and a blast was necessary to enable the lessee to use his forges and was when the lease was made and subsequently thereto for years actually supplied, so essential an incident will be considered as passing by the lease, and it will not be presumed to have been held by the lessee, under a license, revocable at will.⁷⁸ Usually there is no implied obligation on the lessor to furnish the lessee with steam power. Thus, the lease of a foundry with the joint use of an engine room by the parties with an agreement by the tenant to pay for steam furnished by the landlord, in consideration of which the landlord was to have the use of the engine free of charge, does not bind the landlord to furnish the tenant with steam. There certainly is no express obligation to do this nor is there one implied from the terms of the agreement.⁷⁹ An agreement by a lessee simply to pay for steam furnished without requiring the lessor to furnish any, and without the lessor agreeing to furnish any, raises no obligation to furnish or accept power. But if the furnishing of steam by the lessor was a necessary incident to the use of the premises by the occupant and the power had been used by a former tenant and the lessor knew all this, there may arise a presumption that the lessor was to furnish steam power. A

⁷⁷ Thomas v. Wiggins, 41 Ill. 470.

⁷⁹ Penn. Iron Co. v. Deller, 113 Pa. St. 635, 18 W. N. C. 371, 43

⁷⁸ Threpp v. Field, 26 N. J. Eq. 82, 85.

L. I. 499.

landlord of a mill who leases a part of the mill with machinery and who agrees to supply steam or other power for working the machinery is by implication compelled to supply the power in such quantity and manner as will render the working of the machinery safe. If, owing to a defect in the machinery, power is supplied in such excess as to break the machinery, and to kill one of the tenants working there, the landlord will be liable. The supply of the power is not a mere incident of the lease of a portion of the premises, but is a substantial contract in itself. and the tenant is not compelled to take it when it is furnished in a careless and negligent manner. He may recover from the landlord upon the theory of his negligence or upon an implied warranty of the quality of the power, any damages he may have suffered by reason of an improper, insufficient or excessive supply of steam or other power.⁸⁰ A tenant who sues his landlord for a failure to furnish steam power which he has contracted to furnish, it has been held in New York, cannot recover for loss of profits, nor for the value of materials lost, nor for losses by reason of inability of his workman to do the amount of work he could have done had proper steam power been furnished, nor for repairs to his machinery.⁸¹ The measure of his damages is the difference between the rental value of the premises without any steam power and its value with the power which the landlord has agreed to furnish, having relation to the particular use which was to be made of the building by the tenant.⁸² In Massachusetts, it has been held that the lessee may recover the actual damages which he has sustained in loss of business by reason of the failure or refusal of the lessor to furnish steam power which he has covenanted to supply. An agreement by the lessor that he will not charge any rent for the time the lessee is deprived of steam power by his failure to supply it, does not constitute a liquidation of the damages unless it clearly and unequivocally

⁸⁰ Bentley v. Metcalf, 75 L. J. K. B. 891, (1906) 2 K. B. 548, 95 L. T. 596, 22 T. L. R. 676; Trenkman v. Schneider, 26 Misc. Rep. 695, 56 N. Y. Supp. 770, reversing 51 N. Y. Supp. 232, 23 Misc. Rep. 336.

⁸¹ Manhattan Stamping Works v. Koehler, 45 Hun, 150; Russell

v. Giblin, 16 Daly, 258, 32 N. Y. St. Rep. 59, 10 N. Y. Supp. 315, affirming 5 N. Y. Supp. 545, 25 N. Y. St. Rep. 827.

⁸² Pewaukee Milling Co. v. Howitt, 86 Wis. 270, 56 N. W. Rep. 784.

appears such was the intention of the parties.⁸³ If the failure to furnish steam power results in the total deprivation of the use of the premises, it may be regarded as an eviction. The failure of the landlord to furnish his tenant, who is a manufacturer, employing steam with steam power, where the lease stipulates that the landlord shall furnish a given amount of power, by reason of which the tenant's men were kept idle, the tenant suffered great loss in his business and he was finally compelled to surrender the premises, is a constructive eviction which may be set up by the tenant as a defense in an action to recover rent.⁸⁴ A landlord who has covenanted in a lease of a floor space, that he will furnish a certain quantity of power to operate the machinery of his lessee, cannot be compelled to do so by an injunction. Nor can he be restrained by a court of equity from furnishing a less amount of power. This case comes under the rule that a contract for service will not be enforced by injunction. The lessee's remedy is a legal one. He cannot in equity procure a specific performance of the contract of the landlord to furnish steam power unless it can be shown that there is an obligation on his part to accept such power. The measure of his damages at law would be the direct loss to his business because of the failure of the landlord to furnish steam power.⁸⁵ The lease of a factory operated by water power not containing an express grant of such power will convey a right to use the power by implication so far as the lessor possesses the right but no further. If, therefore, the water power was but part of a larger water power in which the lessor was a co-tenant with others and the lessee should use more than his lessor's proportion of it, no right of action against the lessor could arise in favor of other co-tenants.⁸⁶

⁸³ *Fisher v. Barrett*, 4 Cush. (Mass.) 381, 383.

⁸⁴ *Myer v. Roberts* (Or. 1907), 89 Pac. Rep. 1051; *Trenkman v. Schneider*, 56 N. Y. Supp. 770, 26 Misc. Rep. 695, reversing order, 51 N. Y. Supp. 232, 23 Misc. Rep. 326. For a lease of steam power under very peculiar circumstances of the ignorance of both parties

as to what they were to give and receive, see *Smith v. Werwenz*, 185 Mass. 229, 70 N. E. Rep. 57.

⁸⁵ *Sipe v. Bartlett*, 12 Ohio C. D. 226, 22 R. 230.

⁸⁶ *Wyman v. Farrar*, 35 Me. 64, 71, also construing the words, "as now used," in connection with a mill run by water power.

§ 209. *Miscellaneous cases.* There are many sorts and kinds of contracts for the use of land the character of which is extremely doubtful. Their construction is dependent upon the particular circumstances of each case and the language of the contract. Thus, the question may arise whether an instrument in writing is a lease of land or a license, whether it is a lease or a contract of sale, or a contract for the hiring of personal property. Thus, for example, an agreement by which the officials of a town confer an exclusive privilege of using a building which is erected by the person who received the privilege as a market house to keep the same as a market under a town ordinance requiring vendors of goods to rent a stall of him in the building at prices fixed by the ordinance is not a lease where the house was erected upon property which the town did not own. The fact that no interest in the land passes under this instrument deprives it of the character of a lease. The party to whom the privilege is granted has his remedy for the breach of the contract if the town subsequently erects, or permits others to erect a market elsewhere, but he cannot use any remedy against the town which he might have had if the contract were a lease.⁸⁷ An agreement by which a person agrees with a corporation to place on the premises owned by the corporation, electric lights at a certain rental per month, is not a lease, but a hiring of personal property by the corporation.⁸⁸ The line between a license and a lease is sometimes difficult to distinguish. Thus, a privilege granted by a deed in return for an annual payment by which the grantee is permitted to discharge the drainage of his land upon the lands granted in the deed, is a lease and not a license. The occupation of the land by the drainage is evidently sufficient possession to constitute this agreement a lease.⁸⁹ The sale of lumber by a person upon whose land it is growing does not alone constitute the vendee a tenant of the vendor; but an instrument executed by the land owner granting all the timber, grass and berries that may be found on the land for a term of years and giving him possession is a lease. The grantee may sue there-

⁸⁷ *Brookhaven v. Baggett*, 61 Miss. 383, 390.

⁸⁸ *Bruckman v. Hargadine-Mc-*

Kittrick Dry Goods Co., 91 Mo. App. 454.

⁸⁹ *Morrell v. Mackman*, 24 Mich. 279.

after in his own name, as a tenant of this land, for trespass upon it and for the conversion of any of the products of the land during the term.⁹⁰ The purchaser of lumber growing on land will by implication have a license to enter upon the land to remove it which he must do in a reasonable time. If he does not remove it in a reasonable time after he is notified that he must take it away, he will become a tenant of the owner by reason of his delay in the absence of an express agreement to the contrary. If the notice to remove the lumber be accompanied by a statement that a specified rent will be charged in case of his failure to remove it, he will be compelled to accept the term if he permits the lumber to remain.⁹¹ Contracts and agreements by which owners of land containing coal or other mineral, permit other persons to enter upon the land, and to dig mines thereon are usually regarded as leases. The possession of the person operating the mine or quarry is the possession of a tenant. This presumption is strengthened by the fact that there is a fixed sum payable as rent.⁹² Thus, an exclusive privilege for a specified term of years, allowing the party to whom it is granted to quarry and take away all the stone he may have use for upon paying the owner of the land a certain fixed sum, according to the quantity taken by him is a lease. It is binding as such on both parties where it is clear from the evidence that they intended that the quarry should be actually worked. It is binding on the lessee and he cannot treat it as a mere option. He must take out a reasonable quantity of the stone, though he may not have use for all he takes; and if he fails to do so, he is responsible in damages which are to be measured by the agreed amount he was to pay.⁹³ The giving of a lease of a stall in a market by a city corporation does not deprive it of its power to regulate markets. The creation of the relation of landlord and tenant between a city and a market man does, however, limit the power which the city may exercise over the market. Under such an agreement it would certainly have less power over the use which the market man might make of his premises than where the per-

⁹⁰ *Freeman v. Underwood*, 66 Me. 229.

⁹¹ *Ducey Lumber Co. v. Lane*, 59 Mich. 521.

⁹² *Greenough's Appeal*, 9 Pa. St. 18.

⁹³ *Watson v. A'Hern*, 6 Watts (Pa.) 362.

mission to occupy a stall is a mere license. An instrument executed by a city which confers upon the occupant of a market stall a right of possession in exchange for the payment of a daily rent is a lease. Having granted a lease, the lessor cannot arbitrarily prevent the tenant from using the telephone service in connection with his occupation of the stall, or limit his occupation and enjoyment of the stall in an arbitrary manner. No such power is conferred upon the city though in its charter it may have an almost arbitrary power to regulate a public market. The lessee, however, will not be permitted, because he is a lessee, to make an unreasonable use of the premises which has been leased to him or to use it in such a way that it will interfere with the rights of others in the market. The lessor still has the power to make reasonable regulations which shall be applicable to all persons who occupy stalls in the market.⁹⁴ A contract by the owner of a mill by which the other contracting party is to operate it and manufacture shingles from wood furnished by the owner for which he is to be paid so much per thousand out of which he is to pay for lumber and tools, is a contract of personal hiring and not a lease of the mill.⁹⁵ And in conclusion, a contract between the owners of lands which are adjoining that a third person is to erect machinery with a boiler to operate it on the land of one of them, which machinery and boiler are to be used by both of the contracting parties, with a provision that the one who makes the largest offer for the share of the other should have the first right to buy it, and that neither of them would sell his land without the consent of the other, is not a lease. Hence the relationship of landlord and tenant does not exist between the two parties.⁹⁶

§ 210. **Whether occupant of premises is servant or tenant.** The necessity of determining the relations of the parties to a contract of hiring may arise where the servant occupies premises belonging to the master. The inquiry may then be, is the servant a servant only or is he also a tenant with all the rights of a tenant. The matter is always one of intention to be determined upon all the facts and circumstances of each particular

⁹⁴ *Swayze v. City of Monroe* (La. 1906), 40 So. Rep. 926.

⁹⁵ *Whitney v. Clifford*, 46 Wis. 128.

⁹⁶ *Hill v. Hill*, 43 Pa. St. 528.

case. No general rule can be laid down which shall be decisive in all cases.⁹⁷

§ 211. **The intention of the parties.** In determining whether a contract is a lease or one of hiring, it must first be decided whether the principal object of the parties is to treat and arrange for the possession and occupation of the premises with an intent that the rent shall be paid in labor by the occupant as a tenant, so that the services are merely an incident of the renting; or whether the principal purpose of the parties was to supply and to procure labor, and the possession and occupation of the premises were incidental to the labor. This is a question of law for the court to be decided upon the terms of the contract and all the circumstances of the parties as they may be determined by the jury, with particular relation to the character of the services which were to be rendered. If the principal subject of the contract is labor, if that was what the owner of the land was desirous of securing and the occupant of supplying, then it is a hiring, and not a lease, and the occupation is the occupation of a servant or agent and not that of a tenant.⁹⁸ For the occupancy of the premises by a servant where the purpose of the occupancy is merely to enable the servant the better and more conveniently to perform his services, does not create the relation of landlord and tenant, particularly where there is no letting in express terms and no rent is reserved in money.⁹⁹ In other words, where the occupation of the premises is not the principal thing, but where it is merely an incident of the em-

⁹⁷ A person who occupies the premises as the servant or agent of another for the more convenient performances of his duty acquires no estate therein, and is neither a tenant at will nor by sufferance, though he is permitted to carry on an independent business on the premises and receives lower wages for that reason. In such, and indeed all, cases where the possession is given for a special purpose, the transaction is treated as a license, not as a lease, and does not confer any estate in the property to which it relates, and the

relations of the parties is determined whenever the special purpose is accomplished. *Deutsch v. Chemical Co.*, 11 Ohio Dec. 495, 8 N. P. 428.

⁹⁸ *Bowman v. Bradley*, 151 Pa. St. 351, 24 Atl. Rep. 1062, 1063, 31 W. N. C. 142, 17 L. R. A. 213.

⁹⁹ *School District No. 11 of Alpine Tp. v. Batsche*, 106 Mich. 330, 333, 64 N. W. Rep. 196; *Kerrains v. People*, 60 N. Y. 221; *State v. Curtis*, 4 Dev. & B. (N. C.) 222; *Rex v. Inhabitants of Chesnut*, 1 Barn. & Ald. 473

ployment, and to give the occupant a better and fuller opportunity to perform the duties of his contract of employment, the occupant is a servant and not a tenant.

¹ *Mayhew v. Suttle*, 4 E. & E. 347; *Allen v. England*, 3 F. & F. 49; *Bertie v. Beaumont*, 16 East, 229; *Rev v. Stock*, 2 Taunt. 339; *Rex v. Bardwell*, 6 Ad. & El. 278; *Regina v. Ponsonby*, 3 Ad. & El. (N. S.) 14; *Rex v. Tynemouth*, 12 East, 46. A company owned land on which it opened quarries. On the land the company erected buildings which were designed for use as boarding-houses for employees. It made a contract with a person to "run" these boarding-houses, by the terms of which he was to furnish all furniture, bedding, etc., for the houses, to board the company's men for so much per week and to pay it so much rent each month. The company deducted each man's board bill from his wages and paid the total over to the person, less the rent for the premises. The number of men employed by the company varied each week, and the company neither agreed to furnish a certain number of boarders nor that all their men should board with the party. The latter gave his time and personal attention to the supervision of the boarding-house. It was held that this amounted to a lease of the house and created the relation of landlord and tenant, and not of master and servant, between the parties. *Lightbody v. Truelson*, 39 Minn. 310, 40 N. W. Rep. 67. In deciding this case the court said: "A tenant may be defined to be one who has possession of the premises of another in subordination to that other's title, and with

his consent. No particular form of words is necessary to create a tenancy. Any words that show an intention of the lessor to divest himself of the possession and confer it upon another, but of course in subordination to his own title, is sufficient. While, of course, the existence of certain things is necessary to constitute a lease, there is no artificial rule by which the contract is to be construed. It is largely a question of the intention of the parties, to be collected from the whole agreement. It seems to us that the agreement in the present case all looks to a leasing of these boarding-houses to plaintiff, and not to an employment of him as an agent to manage them for the company. Every provision of the contract contemplates his occupancy as landlord or proprietor. There is nothing to indicate that his possession of the buildings was not to be exclusive; on the contrary, the nature of the business and the manner in which it was to be run, necessarily imply that it was to be inclusive. He was to run the business, not for the benefit of the company, but for himself; the profits, if any, being his, and the losses, if any, he would have to stand. He took his chances on the number of boarders he would get; the company did not obligate themselves to furnish any particular number. He furnished the house and provided the supplies at his own expense, just as any boarding-house keeper would do, if running the business as princi-

§ 212. **Illustrations of the rule.** The fact that the occupant of land is by a writing designated as the servant, agent or superintendent of the owner of the land, while some evidence, is by no means conclusive. It may be shown by all the other circumstances that a lease was made in which case the occupant will be a tenant.² The fact that one who is acting as a servant has given him the absolute possession of the premises for a definite period is a very strong circumstance to show that he is also a tenant.³ On the question whether the occupant is a servant or a tenant the facts are usually contradictory. It is for the jury to determine. The absence of any contradiction as to the facts makes it a question of law for the court. A person who acts as janitor and occupies apartments in the building which he rents from his employer by the month is usually a tenant. The fact that he deducts his salary from the rent does not alter the relationship which exists between him and the owner.⁴ On the other hand, a man and his wife who engage to work for the term of a year as a farmer and housekeeper for the owner of the farm are servants only. The fact that they occupy a house on the premises does not alone make them tenants.⁵

§ 213. **The character of the possession of the premises as determining whether an occupant is a servant or tenant.** In determining whether a writing is a lease or a contract of hiring, the court must consider what possession and control the occupant is to exercise over the premises. This is material to determine whether an occupant is a servant or a lessee. A lease involves possession by the lessee which during the term is so far adverse to the lessor as to give the lessee a right to bring tres-

pal, and not as agent for another. What was paid him was for boarding the men, and not as compensation for services as agent. Moreover, he paid a fixed rent for the use of the buildings, the amount of which was not at all dependent upon the number of boarders the company furnished. It was to be the same whether they furnished one or one hundred. The manner in which the board-bills of the men or the rent for the buildings

were paid was unimportant. That was a mere question of convenience."

² *Colcord v. Hall*, 3 Head (Tenn.) 625.

³ *Snedaker v. Powell*, 32 Kan. 395.

⁴ *Anderson v. Steinrich*, 74 N. Y. Supp. 920. See, also, *Ofoch-lager v. Sinbeck*, 50 N. Y. Supp. 862, 22 Misc. Rep. 595.

⁵ *Haywood v. Miller*, 3 Hill (N. Y.) 90

pass.⁶ The power of a servant over the premises which he occupies as to their use, maintenance and repair is vastly more limited than that of a tenant under the same circumstances. Thus, the courts have considered that while many provisions in a lease have a double aspect and may be consistently construed to make the occupant either a servant or a tenant, others admit of only one construction. Thus a provision that the occupant of a factory is to keep it in repair, that he should have possession of it for a particular use, that he should employ and discharge all persons employed in the factory and fix their wages, that he should determine the water power to be used, that he might use the adjacent land, lease buildings thereon and receive and appropriate to his own use the rents for the same being appropriate to a lease and not to a contract of hiring, admit of but one construction and raise a conclusive presumption that the relation of landlord and tenant exists between the parties.⁷ So, where the owner of a hotel agreed that a party might occupy it for a term of years, during which he was to live there with his family rent free, employ and discharge servants and manage and control the business and in compensation therefor, receive a stipulated portion of the net profits, the relation between the parties is that of landlord and tenant, not that of master and servant.⁸ It is quite different where the occupant is the servant of the owner. In the latter case, he has no possession of his own, except so far as he has a license to remain on the land which is revoked by his discharge as a servant. If the occupation by the servant is merely incidental to his employment, the relation of landlord and tenant does not exist.⁹ If the use or the occupation of the land be as a servant, the master still has possession inasmuch as possession by the servant is the possession of the master. As soon as the servant is discharged he becomes a trespasser as to the master if he remain on the land and must, on

⁶ Zinnel v. Bergdoll, 9 Pa. Super. Ct. 522, 7 Del. Co. R. 369, 44 W. N. C. 54.

⁷ Fiske v. Framingham Mfg. Co., 14 Pick. 491, 493.

⁸ Page v. Street, Speers (S. C.) Eq. 159. But see *contra*, State v. Page, 1 Speers (S. C.) 408, 40 Am. Dec. 608.

⁹ McQuade v. Emmons, 38 N. J. Law, 397; Haywood v. Miller, 3 Hill (N. Y.) 90; People v. Annis, 45 Barb. (N. Y.) 304; Bowman v. Bradley, 151 Pa. St. 351, 24 Atl. Rep. 1062, 31 W. N. C. 142, 17 L. R. A. 213; McCutcheon v. Crenshaw, 40 S. C. 511, 19 S. W. Rep. 140.

request, quit the premises. He may, it has been held, be ejected by the master or at his direction and for that purpose such force may be used as is reasonably necessary. And the right of the master to eject his discharged servant in no wise depends upon the answer to the question whether the servant was rightfully or wrongfully discharged. It exists in the one case as well as in the other; the only remedy of the servant being found in an action against the master for damages for a breach of the contract of employment.¹⁰

¹⁰ *Lightbody v. Truelson*, 39 Minn. 310, 40 N. W. Rep. 67. In speaking of a farm servant the court, by Williams, J., in *Bowman v. Bradley*, 151 Pa. St. 351, said: "The labor was to be performed upon the land, in its cultivation, in the care of the cows, and the delivery of the milk. As Bowman was not a cropper, or a tenant paying rent, his possession of the land and the cows, and the implements of farm labor, was the possession of his employer. The barn was used to stable the cattle and store their feed. The house was a convenient place for the residence of the laborers. The house, the barn, the land, the cattle, the farming tools, were turned over to the man who had been hired to care for the property; but he had no hostile possession, no independent right to possession. His possession was that of the owner whom he represented, and for whom he labored for hire. This is not denied as to the farm, the barn, the stock, or the tools, but an attempt is made to distinguish between the house and everything else that came into the possession of the employee in pursuance of the contract of hiring. There is no valid ground on which such a distinction can rest. If the possession of the house be re-

garded as an incident of the hiring, the incident must fall with the principal. . . . His right under the contract of hiring was like that of the porter to the possession of the porter's lodge; like that of the coachman to his apartments over the stable; like that of the teacher to the rooms he or she may have occupied in the school building; like that of the domestic servants to the rooms in which they lodge in the house of their employers. In all these cases, and others that might be enumerated, the occupancy of the room or house is incidental to the employment. The employee has no distinct right of possession, for his possession is that of his employer, and it cannot survive the hiring to which it was incidental, or under which it is a part of the contract price for the services performed. So in this case, if the contract was simply a contract for labor at one dollar per day and a house to live in, the plaintiff held the house by the same title and for the same purpose that he did the land or the cattle in the care of which his labor was to be performed. When his contract was ended, his rights in the premises were extinguished, and it was his duty to give way to his successor.

§ 214. **The power of the master to remove his servant from the premises.** The question whether the occupant of premises owned by another is a servant or a tenant of the owner, may arise where the owner seeks to employ force to remove the goods of the occupant from the premises and the latter has resisted force with force. If the relation of master and servant exists between the occupant and the owner, it follows that the legal possession of the premises is in the owner and not in the servant and he would consequently have the legal right to remove the goods and furniture of the occupant therefrom. Having such legal right, and the possession of the servant being merely the possession of the owner, the latter is justified in using the degree of force necessary to effect the removal of the goods and the occupant would not be justified in using force to prevent their removal unless the conduct of the owner was such that, because he threatened to use a pistol or other deadly weapon, the occupant believed or had reason to believe that his life was in imminent danger. Under circumstances of this character the occupant, though he be a servant, would be justified in using the necessary force to prevent injury to himself but no more. If, on the other hand, the occupant is holding the premises as a tenant and not as a servant of the owner, he has the legal right to defend his property and possessions by proper and necessary means even to the extent of employing force. He can then legally be ousted only by some appropriate action provided by law, for the purpose of transferring to the owner the possession of the property. If, however, being a tenant, he shall employ excessive or unnecessary force in resisting the efforts of his master, who is also the owner of the premises, to regain possession either as to the amount of the force employed or as to the character of the weapons used, he may make himself criminally liable.¹¹

§ 215. **Contract of hiring by a religious society.** A contract by which a religious society hires a pastor or minister is in law a contract of master and servant. The consideration proceeding from the society is usually a salary and in some cases the use of the parsonage as a residence. The occupation of the parsonage by the pastor as a part of his compensation does not necessarily make him a tenant thereof. The contract between him and his employer is a personal hiring and terminates on his death

¹¹ *People v. Kerrains*, 60 N. Y. 221.

because of the rule that a contract personally to either party terminates with the death of the party. Hence, it follows that the personal representative of the pastor after his death has no right to the possession of the parsonage, for usually the pastor's occupation of the parsonage being connected with and in consideration of his services as pastor does not create the relation of landlord and tenant, between him and his church.¹² So, it is held that the relationship which exists between a bishop of the Roman Catholic church and a priest of his diocese and under his jurisdiction is that of master and servant. In almost all cases the priest as a part of his compensation occupies premises which are owned by the church. He is therefore on the basis of any other employee or agent of the owner and his possession is the possession of his employer. The fact that the title of all the real property occupied by the priest as a parsonage is vested absolutely in the bishop as an individual, does not alone establish the relationship of landlord and tenant between the priest and the bishop. The contract of hiring is usually terminable at any time at the election of the bishop and after it is terminated he may treat the priest as an intruder where he holds over on premises belonging to the bishop.¹³

§ 216. **A public officer as a tenant of a county.** It is hardly necessary to say that a public officer holding office under a municipal or county government is not the tenant of the building occupied by him in his official capacity. Nor will the fact that he carries on a private business in connection with the performance of his official duties make him a tenant of the county and city in the absence of an express agreement to that effect. Thus, the register of deeds of a county is not a tenant of the county, though under his appointment he is entitled to the use and possession of an office in the building owned by the county. The fact that while thus in possession officially of the building he carries on a private business does not make him a tenant of the county nor raise any implied promise on his part to pay rent. The fact that a person not an official carries on the deputy register's private business in the building owned by the county during the time the deputy is out of office, together with the fact

¹² East Norway, etc., Church v. Froislie, 37 Minn. 447, 450, 35 N. W. Rep. 260.

¹³ Chatard v. O'Donovan, 80 Ind.

that the official paid rent for the building while he was out of office, does not make him liable for rent after he shall have been restored to office.¹⁴ The relation between a teacher and the public officials of a school district by whom he is employed is that of master and servant. The furnishing of living apartments by the authorities for the teacher in the school building does not make him a tenant. Of course, the relation of landlord and tenant may be created under such circumstances by express language, but the fact that the occupancy of the school building enables the teacher to perform his duties more conveniently is a very strong circumstance to show that there was no intent on the part of either party that there should be a tenancy.¹⁵

§ 217. **A servant holding over after his employment is at an end.** This discharge of a servant who has occupied the premises of the master terminates his right of occupancy. If he is a servant merely and not a tenant, it would seem that upon the termination of the hiring he would become a mere trespasser. It has been held, however, in one or two instances, that having been in possession lawfully he becomes a tenant at sufferance when he holds over without the right to do so. But this is true only where the master or owner of the premises consents that he shall remain long enough to raise an implication of acquiescence in the occupancy.¹⁶ If the duration of the employment is not fixed or certain, it may be terminated by reasonable notice. On the termination of the employment by notice the tenant who occupies premises owned by the master ought to have a reasonable time to remove and would be regarded as a tenant at sufferance.¹⁷

§ 218. **The rights of the third parties.** Whether an occupant of land is a servant of the owner or a tenant is important to determine because of the rights and interests of third parties. Thus, where a tenant being "a cultivator of the soil" on shares with the owner has a right to incumber the crop with liens before its division, it has been held that a mere servant or

¹⁴ Board of Supervisors v. Cawgill, 97 Mich. 448, 56 N. W. Rep. 849.

¹⁵ School District v. Batsche, 106 Mich. 330, 64 N. W. Rep. 196.

¹⁶ School District v. Batsche,

106 Mich. 330, 64 N. W. Rep. 196; People v. Annis, 45 Barb. (N. Y.) 304.

¹⁷ Eichengreen v. Appel, 44 Ill. App. 19.

employee of the owner cultivating the land on shares as the agent and not as the tenant of the owner cannot dispose of or incumber the crops until its division. In determining whether one is a servant and employee or a tenant, stipulations in the agreement to the effect that the person who is claimed to be a servant was to occupy the premises, to keep it in repair, and that the other party should make advances, are material to show that he was a tenant. They are in fact utterly inconsistent with the supposition that he was merely an employee.¹⁸ If, however, the owner of the land has the entire control of the time and services of the occupant the latter is a servant or employee and not a tenant and cannot create any lien upon the crops or productions of the land which will vest any rights in third persons to the prejudice of the owner.¹⁹

§ 219. **The distinction between croppers and tenants.** A cropper is a person who is hired by an owner of land to cultivate it. He receives as his compensation a share of the crops. Several circumstances distinguish such a person from a tenant. In the first place in the case of a cropper, the landlord retains the legal right to the possession and the ownership of the crop. The cropper has no interest whatever in the land or any right to its possession, except so far as he has a right to be on the land in order to carry out his agreement.²⁰ A cropper's possession is the possession of a servant. Nor has he any property in his share of the crops until the division is made between him and the owner of the land. Hence, he cannot maintain an action in trespass for an injury to the land, or for damages to the crops before they are divided. Nor can a mere cropper convey an interest in his share of the crops, prior to the division.²¹ On the other hand, the relation between a party who cultivates land under an agreement with the owner of the land that they are to divide the crops between them may be that of landlord and tenant. If such is the case, the ownership of the crops is in the

¹⁸ Whaley v. Jacobson, 21 S. Car. 51.

¹⁹ Huff v. Watkins, 15 S. Car. 83.

²⁰ Shoemaker v. Crawford, 82 Mo. App. 487.

²¹ Fry v. Jones, 2 Rawle (Pa.)

12; Adams v. McKesson's Ex., 53 Pa. St. 81, 91 Am. Dec. 183; McNeely v. Hart, 10 Ired. (N. Car.) Law, 63; Harrison v. Ricks, 71 N. Car. 11; Kelly v. Rummerfield, 117 Wis. 620, 622.

tenant during the term, and the landlord has no right or title to his share until they are harvested and divided. Again, where the occupant is a tenant and not a mere cropper, he has the exclusive possession of the land during the term; and the landlord's entry is a trespass. It will readily be seen that any arrangement to share crops under which either party owns them until they are actually divided may work to the disadvantage of the other party to the agreement. The tenant who agrees with his landlord to pay the rent in a share of the crops may dispose of them and abscond with the proceeds; while the landlord who, by an agreement with a cropper retains the actual and absolute ownership of the crop may oust the cropper and dispose of the crops, leaving the other party to the contract to an action for damages. To avoid this difficulty a form of contract which is known as the "cultivation of crops on shares," has been invented in which one party supplies the land and the other the labor and material for using it, and both parties are, regarded as tenants in common of the crops until the division is had.²² By this contract, both parties are protected and either may dispose of, or encumber his share, but neither can dispose of the share of the other. It is sometimes difficult to determine whether a person who cultivates the land of another on shares is a tenant in common of the crop with the owner or a mere cropper. Much depends upon the wording of the contract between the parties.²³ Each case

²² *Smith v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193; *Brown v. Coats*, 56 Ala. 439; *Smith v. Rice*, 56 Ala. 417; *Ponder v. Rhea*, 32 Ark. 435; *Rohrer v. Babcock*, 126 Ill. 222, 56 Pac. Rep. 537; *Smith v. Schultz*, 89 Cal. 526, 26 Pac. Rep. 1087; *Randall v. Ditch*, 123 Iowa, 58, 99 N. W. Rep. 190, 191; *Walker v. Fitts*, 24 Pick. (Mass.) 191; *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Strangeway v. Eisemman*, 68 Minn. 395, 71 N. W. Rep. 671; *McNeal v. Ryder*, 79 Minn. 152, 81 N. W. Rep. 820; *Loomis v. O'Neal*, 73 Mich. 582, 41

N. W. Rep. 701; *Kamerick v. Castleman*, 23 Mo. App. 481; *Daniels v. Brown*, 34 N. H. 454, 69 Am. Dec. 505; *Guest v. Opdyck*, 31 N. J. Law, 552; *Foote v. Colvin*, 3 Johns. (N. Y.) 216; *Harrower v. Heath*, 19 Barb. (N. Y.) 331; *Dinehart v. Wilson*, 15 Barb. (N. Y.) 595; *Wilber v. Sisson*, 54 N. Y. 121; *Bowers v. Graves*, 8 S. Dak. 385, 66 N. W. Rep. 931; *Fowles v. Martin*, 76 Vt. 180, 56 Atl. Rep. 979.

²³ *Kelly v. Rummerfield*, 117 Wis. 620, 622, 94 N. W. 649.

must be decided upon the special terms of the agreement, taking into consideration the subject matter and all the circumstances, the question being always as to the real intention of the parties.²⁴ Generally, an arrangement by which one party furnishes the land and another the labor on an agreement that the crop shall be divided will not be presumed to create the relation of landlord and tenant in the absence of clear evidence to that effect.²⁵ If there is an indication that the parties intend that the occupant shall have a right to the possession of the farm and the full power of controlling and using it for farming purposes as though it were his own, the contract is a lease. The mere fact that rent is payable in a share of the crops does not alone show that the agreement is not a lease.²⁶ So, where an occupant of land is to pay rent either in money or a portion of the crops,²⁷ or in money and a portion of the crops,²⁸ the relation between the parties is that of landlord and tenant. The same construction was applied where the occupant agreed to give the owner one half of the income of the farm.²⁹

The circumstance that the lease contained the terms "lease, demise and let." is a strong fact to show that the instrument is a lease and not a mere cropping contract.³⁰ But a contract by which each party is to furnish half the seed and to divide the crops equally and both parties are to reside on the farm though in separate houses makes the parties tenants in common of the crop.³¹ On the other hand, the fact that nothing is said as to the duration of the agreement between the parties is a strong indication that the relation of landlord and tenant does not exist.³² So, too, an express stipulation that the crop is to remain the property of the landlord until it is harvested is

²⁴ Moser v. Lower, 48 Mo. 504;
Johnson v. Hoffman, 53 Mo. 504.

²⁵ Ponder v. Rhea, 32 Ark. 435;
Brown v. Coats, 56 Ala. 439.

²⁶ Strain v. Gardner, 61 Wis.
174; Foley v. Southwestern Land
Co., 94 Wis. 329; Steel v. Frick,
56 Pa. St. 172; Brown v. Jaquette,
94 Pa. St. 113; King v. Bosserman,
13 Super. Ct. 480; McClellan v.
Whiney, 65 Vt. 510, 27 Atl. Rep.
117.

²⁷ Taylor v. Coney, 101 Ga. 655,
28 S. E. Rep. 974.

²⁸ Bryant v. Pugh, 86 Ga. 525,
21 S. E. Rep. 927.

²⁹ Rowland v. Voechting (Wis.),
91 N. W. Rep. 990.

³⁰ Rowland v. Voechting (Wis.),
91 N. W. Rep. 990.

³¹ Reynolds v. Reynolds, 48 Hun,
142.

³² Moser v. Lomer, 48 Mo. App.
85.

usually conclusive that the occupant or cultivator is a mere cropper.³³

§ 220. **The ownership of the crop.** The phrase "renting on shares" implies that both parties will share equally in the products of the land, to compensate the one for his labor and the other for the use of the land. If the occupant of the land is more than a mere cropper or servant of the owner, his right in the crop is usually considered to be vested before division. The parties may expressly provide that the title to the crop shall remain in either of them until division. If the contract is clearly one of landlord and tenant, the general rule applies and title to the crop is in the tenant. But where the owner and occupant are to share the crop it is more difficult to determine. Usually where an agreement is made that one party is to furnish the land and the other is to furnish the seed and the tools for its cultivation, together with the necessary labor, the crop to be divided, the parties will be regarded as tenants in common of the crop, in the absence of an express agreement to the contrary.³⁴ It follows from this that where owner and occupant are tenants

³³ *Mammoth v. Creekmore*, 48 Ark. 264, 3 S. W. Rep. 180. It is sometimes expressly provided by statute that the title to crops shall remain in the owner of the land where the land is cultivated by a cropper on shares. *De Loach v. Delk* (Ga. 1904), 47 S. E. Rep. 204; *Parker v. Brown* (N. C. 1904), 48 S. E. Rep. 657. Where this is the case, a person claiming under the cropper cannot maintain trover or conversion against the owner or against a purchaser from him, nor can he bring trespass for an entry on the land. *Farrow v. Woley & Jordan* (Ala. 1903), 36 So. Rep. 384.

³⁴ *Jones v. Durrer*, 96 Cal. 95, 30 Pac. Rep. 1027, following *Walls v. Preston*, 25 Cal. 59, and *Smith v. Schultz*, 89 Cal. 526, 26 Pac. Rep. 1087; *Connell v. Richmond*, 55 Conn. 401; *Kamerick v. Castleman*, 23 Mo. App. 481; *Caswell v.*

Districh, 15 Wend. (N. Y.) 379; *Putnam v. Wise*, 1 Hill (N. Y.) 234; *Harrower v. Heath*, 19 Barb. (N. Y.) 331; *Wilber v. Sisson*, 54 N. Y. 121, 53 Barb. (N. Y.) 258; *Randall v. Ditch*, 123 Iowa, 582, 99 N. W. Rep. 190, 191; *Strangeway v. Eisenman*, 68 Minn. 395, 71 N. W. 671; *Anderson v. Listen*, 72 N. W. Rep. 52; *Adams v. State*, 87 Ala. 89, 6 So. Rep. 270; *McNeal v. Ryder*, 79 Minn. 152, 81 N. W. Rep. 830; *Rohrer v. Babcock*, 126 Cal. 222, 58 Pac. Rep. 537; *Loomis v. O'Neal*, 73 Mich. 582, 41 N. W. Rep. 701; *Doty v. Heth*, 52 Miss. 530, 535; *Frost v. Kellogg*, 23 Vt. 308; *Leach v. Beatie*, 33 Vt. 195; *Sowles v. Martin*, 76 Vt. 180, 56 Atl. Rep. 979; *Black v. Golden*, 109 Mo. App. 37, 78 S. W. Rep. 301, 302; *Bernal v. Hovious*, 15 Cal. 544; *Putnam v. Wise*, 37 Am. Dec. 309.

in common of the crop each has a distinct interest which is not subject to the ownership or control of the other and cannot be incumbered by the other.³⁵ Either party to the agreement may sell his share by parol.³⁶ A person cultivating land for a share of the crop, may mortgage his interest in the crop before it is divided.³⁷ A direction by the owner to pay the rent to another is an assignment of the owner's share of the crops. The owner's share thus assigned cannot be subsequently reached by the levy of an execution against him.³⁸ And under the rule that the abandonment of work on the farm by the occupant is a breach of the contract, a cropper loses his interest in the crop where by reason of his abandonment or failure to perform his contract the landlord is compelled to enter and cultivate the farm and reap the crop. While ordinarily the parties to the agreement to work land on shares are presumed to be tenants in common of the crop it is competent for them to arrange for another basis of ownership. They may, for example, expressly agree that the crops which are to be planted and raised on the farm by the person cultivating it are to remain the sole property of the owner of the land until the contract is fully performed, or until a division of the crops provided for in the contract shall have taken place, or until a certain specified date shall arrive, or until some other contingency shall take place. Conditions that the crops raised shall continue to be the property of the owner of the land until they shall be divided, are very frequently met with and no reason can be suggested why such a stipulation is not valid and binding.³⁹ And the general rule that a tenant under a lease to rent land on shares may assign his lease, or sell or mortgage his

³⁵ *Stickney v. Stickney*, 77 Iowa, 699, 42 N. W. Rep. 518.

³⁶ *Muernberger v. Von Der Heidt*, 39 Ill. App. 404.

³⁷ *Bourland v. McKnight*, 79 Ark. 427, 96 S. W. Rep. 179.

³⁸ *Courtney v. Lyndon*, 128 Cal. 35, 60 Pac. Rep. 462.

³⁹ *Sanford v. Modine*, 51 Neb. 728, 71 N. W. Rep. 740, 742; *Yates v. Kinney*, 19 Neb. 275, 27 N. W. Rep. 132; *Summerville v. Stockton M. Co.*, 1 Cal. 1904, 76 Pac. Rep. 243; *Esdon v. Colburn*, 29

Vt. 632; *Wentworth v. Miller*, 53 Cal. 9; *Lloyd v. Powers*, 4 Dak. 62, 23 N. W. Rep. 492; *Moulton v. Robinson*, 27 N. H. 550; *Parker v. Matt*, 43 App. Div. 338, 60 N. Y. Supp. 295; *Consolidated Land, etc., Co. v. Hawley*, 7 S. Dak. 229, 63 N. W. Rep. 904; *Townsend v. Isenberg*, 45 Iowa, 670; *Gray v. Robinson (Ariz.)*, 33 Pac. Rep. 712; *Jordan v. Bryan*, 103 N. Car. 59, 9 S. E. Rep. 135; *Taylor v. Donohue (Wis. 1905)*, 103 N. W. Rep. 1099

share of the crops which he has raised on the demised premises without the consent of his lessor unless expressly forbidden by the lease does not apply to such a case until the moment arrives for a division of the crops for until that moment the title of the tenant is incomplete and he may do nothing which would interfere with the complete ownership of the landlord.⁴⁰ So, under a provision that the landlord is to have the possession of the crops until complete performance by the tenant the tenant has no interest in the crop which can be attached until he has fully performed his contract and the crop is ready for division.⁴¹ On the other hand, in every case where by agreement or under the statute the share of the landlord in the crop is not vested until the time has arrived for its division he cannot maintain any action against the tenant either for his rent or for a share of the crop.⁴²

§ 221. The duties and the rights of the landlord and tenant.

There is an implied covenant on the part of the tenant who cultivates land on shares to cultivate it in a farmerlike manner.⁴³ He must also give the fences and other structures on the property, ordinary care. He cannot charge for the storage of the share of the crop belonging to the landlord unless the latter unreasonably delays the moving of it.⁴⁴ A landlord who objects to the manner in which a tenant on shares is cultivating the land should do so promptly. An objection after the crop has been reaped amounts to nothing.⁴⁵ Usually, where the occupant is a servant or cropper only there may be circumstances which indicate that the owner hired the particular occupant because of his ability and skill. The owner is entitled to have the farm cultivated by the person he has selected and the latter cannot assign his contract without the consent of the owner.⁴⁶ If the occupant without cause abandons the land, the landlord may re-enter and complete the cultivation of the crop. He may then sell the crop

⁴⁰ *Sanford v. Modine*, 71 N. W. Rep. 740, 51 Neb. 728.

⁴¹ *Pelton v. Draper*, 61 Vt. 364, 17 Atl. Rep. 494.

⁴² *Jordan v. Bryan*, 103 N. Car. 59, 9 S. E. Rep. 135.

⁴³ *Cammack v. Rogers* (Tex. Civ. App.), 74 S. W. Rep. 945

⁴⁴ *Evers v. Shumacker*, 59 Mo. App. 454.

⁴⁵ *Young v. Gay*, 41 La. Ann. 758, 6 So. Rep. 608.

⁴⁶ *Meyer v. Livesley* (Oreg.), 78 Pac. Rep. 670, where the occupant was a tenant.

and deduct his expenses from the cropper's share.⁴⁷ But the landlord has no right as long as the tenant is in possession to enter on the land where it appears that the relation between the parties is that of landlord and tenant.⁴⁸ If being a tenant the cultivator abandons the land the landlord may re-enter. But whether the tenant abandons the land is in all cases a question of fact. The act of the tenant in merely removing the furniture from the farmhouse is not in itself an abandonment which will allow the owner to take possession.⁴⁹ The obligation of the occupant of land cultivated on shares which binds him to cultivate the farm in a husbandlike manner cannot be escaped from because, by reason of the failure of the crops, it becomes difficult and expensive to reap a certain portion of them.⁵⁰ The tenant cannot abandon the land for that reason, but he may abandon the land and refuse to reap the crop if he can show that the landlord has prevented him from doing so.⁵¹ Thus, where the owner of land cultivated on shares becomes very abusive and insulting to the tenant the occupant may abandon the land and the conduct of the owner is a breach of the implied covenant of quiet enjoyment. Under such circumstances the abandonment of the land by the tenant does not deprive him of his right to a share of the crops.⁵² And a landlord who has prevented his tenant from gathering the crops to a share of which he was entitled, cannot recover against the tenant the expense of gathering his own share.⁵³ The tenant while in possession after the end of his term is not liable for trespass where the purpose of his possession was the reaping of a crop.⁵⁴

⁴⁷ *Graves v. Walter* (Minn. 1904), 101 N. W. Rep. 297.

⁴⁸ *Kamerick v. Castleman*, 23 Mo. App. 481.

⁴⁹ *Hough v. Brown*, 104 Mich. 109, 62 N. W. Rep. 143.

⁵⁰ *Johnson v. Bryant*, 61 Ark. 312, 32 S. W. Rep. 1081.

⁵¹ *Parker v. Mott*, 43 App. Div. 338, 60 N. Y. Supp. 295.

⁵² *Reynolds v. Reynolds*, 48 Hun. (N. Y.) 142.

⁵³ *Garrett v. Jennings*, 19 Ky. S. Rep. 1712, 44 S. W. Rep. 382.

⁵⁴ *Toles v. Meddaugh*, 106 Mich.

398. Where a tenant plants a crop and then voluntarily abandons the farm he can no longer claim any rights under the contract. Having repudiated the contract, he cannot claim his share of the crops. He might abandon the farm and throw up his contract the next day after sowing the wheat. On his abandonment, the wheat became a part of the land. It might be otherwise where he sows a crop, sells to a purchaser in good faith and then abandons. *Chandler v. Thurston*, 10 Pick.

§ 222. **The remedies of the parties.** The remedies of the parties to an agreement to cultivate land on shares depend upon the question whether the title to the crops is in both of them or whether it is in the landlord only. The tenant or cropper who has faithfully performed his contract, is entitled to his share of the crops when it is reaped and ready for market and the landlord who converts it and refuses to pay over any part of it to the tenant may be sued in conversion.⁵⁵ So, where the tenant has mortgaged his interest in the crop and conferred authority upon the mortgagee to take possession, the latter may replevin from the landlord the tenant's share of the crop.⁵⁶ If, according to the contract the parties are tenants in common to the crop either may sue the other in conversion before the end of the term.⁵⁷ So, also, where an occupant cultivating land on shares, converts the whole crop the landlord may sue in an action of assumpsit and recover the reasonable value of the use of the premises.⁵⁸ The landlord cannot maintain an action for conversion or a similar action against a tenant while his possession of the crop is only such as is necessary for its cultivation, and the tenant does not assert any exclusive ownership or right to the possession of the whole crop.⁵⁹ The tenant who is a tenant in common of the crop so far as third persons are concerned has the same right to recover for injuries to the crop as he would have if he owned the whole of it. He may recover for damages to his share of the crop resulting from the action of the third person, though his landlord may have a lien for supplies and advances on his share. His right to recover the damages is not defeated by the fact that he is bound to pay these debts out of his share of the proceeds of the crop.⁶⁰ It is within the power and jurisdiction of a court of equity to adjust the rights of a landlord and

205; *Kiplinger v. Green*, 28 N. W. Rep. 121, 61 Mich. 340; *Carpenter v. Jones*, 63 Ill. 517.

⁵⁵ *Northness v. Hillstead*, 87 Minn. 304, 91 N. W. Rep. 1112; *Parker v. Brown*, 136 N. Car. 280, 48 S. E. Rep. 657; *Marlowe v. Rogers*, 102 Ala. 510, 14 So. Rep. 790.

⁵⁶ *Alexander v. Zeigler* (Miss.), 36 So. 536.

⁵⁷ *Fagan v. Vogt* (Tex. 1904),

80 S. W. Rep. 664; *Black v. Golden*, 104 Mo. App. 37, 78 S. W. Rep. 301, 302.

⁵⁸ *Pearce v. Pearce*, 184 Ill. 289, 56 N. E. Rep. 311, affirming 83 Ill. App. 77.

⁵⁹ *Olson v. Ausdal*, 13 So. Dak. 23, 82 N. W. Rep. 89.

⁶⁰ *Parker v. Hale* (Tex. 1903), 78 S. W. Rep. 555

tenant who are tenants in common of farm products where the farm has been rented on shares. If the tenant disposes of the produce of the farm he holds the share of the landlord as a trustee and he must account accordingly. The fact that by an express agreement the landlord is to have a lien upon the entire product of the farm for advances and for his share does not alter the relations of the parties. Any title which the landlord might have under such a stipulation is equitable and for security only and if the landlord assumes to sell the products he must account to the tenant as an owner of an equal share. No matter which party disposes of the products of the farm an accounting may be had in equity because of the relation of trust which exists between them. If both parties have sold to a third person having knowledge of their mutual rights and obligations and the third person pays the whole proceeds to either, he is a proper party to an action brought by either of the tenants in common against the other for an accounting and he may be liable in case he has caused a loss to either by paying the wrong person.⁶¹

§ 223. **Relation of landlord and servant not presumed between vendor and vendee.** One who purchases land is not, in the absence of a stipulation to that effect, entitled to possession until the date which is designated in the contract upon which a conveyance is to be made. If with the consent of the vendor, the vendee goes into possession before the date for a conveyance arrives he acquires no right to possession thereby and the vendor may recover possession by an ejectment after demand. The entry of the vendee upon the land under the contract to purchase before conveyance and with the consent of the vendor does not

⁶¹ Sowles v. Martin, 76 Vt. 180, 56 Atl. Rep. 979. The owner may, when he can show that there is imminent danger of the cropper or tenant converting the crops to his own use, apply to a court of equity for a partition and the appointment of a receiver during the pendency of the action. Baughman v. Reed, 75 Cal. 319, 17 Pac. Rep. 222. The personal representative of a cropper or tenant who dies after the crop is grown,

but before it is harvested, succeeds to his rights. He may recover from the owner of the land in a *quantum meruit* the reasonable value of the cropper's share of the crop. Parker v. Brown (N. Car. 1904), 48 S. E. Rep. 657. A landlord who is entitled to an attachment for rent may attach crops in case his rent is payable in a share of the crops. Harmon v. Payton (Kan. 1903), 74 Pac. Rep. 618

make the vendee a tenant of the vendor or create the relation of landlord and tenant between the vendor and vendee, except perhaps from the date when there is a default in the payment of the purchase money. The vendee enters and holds for himself and his title is not subordinate to that of the vendor nor can the latter recover rent from him or for the use and occupation of the premises.⁶² From these principles it follows that where one is let in possession of land under an oral contract of sale, he is not liable to the vendor for rent or for damages for use and occupation until the contract is repudiated because such liability only arises on a contract express or implied and presupposes the relation of landlord and tenant. The fact alone that one takes possession as a vendee disproves any implied contract to pay rent, or to pay for use and occupation. If the contract had been void for any reason the vendee would then become a tenant at will or at sufferance and liable for use and occupation. It is perfectly proper for a vendor whose land is sold on credit to stipulate with the vendee, that the relation of landlord and tenant shall exist and that the vendee shall enter with such an understanding. Until the vendee shall pay for the land he is a tenant and the vendor may treat him as such upon a failure to pay his instalments. There is nothing oppressive in this so long as the rent is applied to the payment of the purchase money. Such contracts are common where land is sold on credit, and, as they are just and fair to all parties, will not

⁶² Bull v. Ellis, 1 Stew. & P. (Ala.) 294; Tucker v. Adams, 52 Ala. 254; Smith v. Maberry, 61 Ark. 375, 33 S. W. Rep. 1068; Vanderheuevel v. Starrs, 3 Conn. 303; Redden v. Barker, 4 Har. (Del.) 179; Brown v. Persons, 48 Ga. 60; Miles v. Elkin, 10 Ind. 329, 330; Kratemeyer v. Brink, 17 Ind. 509, 511; Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; Gould v. Thompson, 4 Met. (Mass.) 224, 228; Lapham v. Norton, 71 Me. 83, 88; Coffman v. Huck, 19 Mo. 435; Kenada v. Gardner, 3 Barb. (N. Y.) 589; Smith v. Stewart, 6 John. (N. Y.) 46; Sylvester v.

Ralston, 31 Barb. (N. Y.) 286; Stone v. Sprague, 20 Barb. (N. Y.) 509; Little v. Pearson, 7 Pick. (Mass.) 301, 302; De Pere Co. v. Raynor, 65 Wis. 271, 22 N. W. Rep. 761, 27 N. W. Rep. 155; Carpenter v. United States, 17 Wall. (U. S.) 489, 21 Law. ed. 680; Watkins v. Holman, 16 Pet. (U. S.) 26, 10 Law. ed. 873; Bradstreet v. Huntington, 5 Pet. (U. S.) 402; Willson v. Watkins, 3 Pet. (U. S.) 43; Blight v. Rochester, 7 Wheat. U. S.) 453. *Contra*, Kirk v. Taylor's Heirs, 8 B. Mon. (Ky.) 62; Proprietors of Township No. 6 v. McFarland, 12 Mass. 325.

be interfered with by the courts.⁶³ On the failure of the vendee to pay rent his rights are forfeited and he will lose what he has paid as rent unless some provision to the contrary is made. He has no interest after his default which can be sold under an execution.⁶⁴

§ 224. The default or the refusal of either party to perform.

The question whether a vendee in possession is a tenant of the vendor and thus is liable for rent or in assumpsit for use and occupation, almost always arises where either by a refusal of the vendee to pay or by a refusal of the vendor to convey the contract is never performed. The majority of the cases in determining that there is no liability for rent on the vendee do not stop to inquire whether the failure to perform the contract is the fault of the vendor or the vendee. If the contract of sale is voluntarily rescinded by the parties, either waives all the default on the part of the other.⁶⁵ If the vendor is in default in conveying when the date arrives when under the contract he is bound to give a deed, he cannot complain that the vendee has had the use of the land gratis with his consent. In justice and fairness to the vendee, the loss of the land through the action of the vendor in refusing to consummate the contract ought to estop the vendor from demanding compensation for its use aside from the rule of law which determines that the relation of landlord and tenant never existed between the parties in the absence of an express contract to that effect.⁶⁶ Thus if, after a vendee has occupied the land sold him, the vendor is unable to convey because he cannot give a good title, or cannot give one which is free from incumbrances, the vendee is under no obli-

⁶³ Crinkley v. Edgerton, 113 N. Car. 444, 449, 18 S. E. Rep. 669.

⁶⁴ Appeal of Chrystie, 85 Pa. St. 463.

⁶⁵ Mariner v. Burton, 4 Har. (Del.) 69.

⁶⁶ Bell v. Ellis' Heirs, 1 Stew. & P. (Ala.) 294; Vanderheuvcl v. Storrs, 3 Conn. 203; Garvin v. Jennerson, 20 Kan. 371, 372; Jones v. Tipton, 2 Dana (Ky.) 295; Little v. Pearson, 7 Pick. (Mass.) 301, 19 Am. Dec. 289; Coffman v.

Huck, 24 Mo. 496; Sylvester v. Ralston, 31 Barb. (N. Y.) 286; Way v. Raymond, 16 Vt. 371, 376; Smith v. Stewart, 6 Johns. (N. Y.) 46; Stacy v. Vermont Cent. R. Co., 32 Vt. 551, 553; Hough v. Birge, 11 Vt. 190. Assumpsit for use and occupation cannot be maintained (Jones v. Tipton, 2 Dana (Ky.) 295; Stacy v. Vermont Central R. Co., 32 Vt. 551, 553, though the vendee alone is at fault. McNair v. Schwartz, 16 Ill. 24, 25.

gation to pay for use and occupation prior thereto.⁶⁷ The vendee should immediately surrender possession on the rescission or abandonment of the contract of sale, for, if he shall continue in possession after a rescission, or after the vendor has defaulted in the performance of the contract, he will be liable as a tenant to the vendor from the date of the default.⁶⁸ Some authorities have held that a vendee who goes into possession under a contract of sale will be liable to pay the rent or for the use and occupation of the premises, though there be no express agreement to that effect, where he subsequently fails to pay the purchase money. He is a tenant at will and, as the use of the premises has been beneficial to him, and the vendor is ready and willing to perform, in order to do justice between the parties, the law, it is said, will imply a promise on the part of the vendee to pay what is right in case he is unable to pay the purchase money when it is due.⁶⁹ The parties may stipulate in the contract of sale that in case the vendee shall default in the payment of the whole or of any part of the purchase money after he has been in possession, he shall thereafter be regarded as a tenant and that what he has paid, if anything, shall be regarded as rent.⁷⁰ Upon the vendee's default, but not before, he becomes a tenant of the vendor and the contract of sale is then transformed at once into a lease, the vendor thereafter having all the rights of a landlord as regards the vendee.⁷¹

§ 225. **The express agreement of the vendee to pay rent.** It is always competent for the parties to a contract for the sale of land to provide that the vendee shall enter before a conveyance

⁶⁷ *Garvin v. Jennerson*, 20 Kan. 371; *Bardsley's Appeal* (Pa. 1887), 10 Atl. Rep. 39. The parties may, upon the rescission of the contract of sale, agree that the vendee shall pay rent as a tenant for his prior occupation of the premises. Such a contract is based on a good consideration, and gives the vendor all the right of a landlord, including a lien against the vendee. *Powell v. Hadden's Ex'rs*, 21 Ala. 745.

⁶⁸ *Dwight v. Cutler*, 3 Mich. 566,

64 Am. Dec. 105, where the vendor failed to tender a proper deed.

⁶⁹ *Patterson v. Stoddard*, 47 Me. 355, 356, 74 Am. Dec. 490; *Fowke v. Beck*, 1 Speers (S. C.) 291.

⁷⁰ *Ish v. McRae*, 48 Ark. 413, 3 S. W. Rep. 440 (agreement to pay "customary rent" on the vendee's default). See, also, *Hill v. Sidie*, 116 Wis. 602, 93 N. W. Rep. 446.

⁷¹ *Block v. Smith*, 61 Ark. 266, 32 S. W. Rep. 1070; *Oxford v. Ford*, 67 Ga. 362. See *Foster v. Goodwin*, 82 Ala. 384, 2 So. Rep. 895

to him and shall hold as a tenant of the vendor. Thus, the relation of landlord and tenant exists where the vendee agrees to pay the vendor a sum of money for rent for the use of the premises before conveyance, if he shall default in paying the purchase price.⁷² The same construction is given to a contract of sale which provides that if either of the parties do not consummate the sale, the money which has been paid on the purchase shall be regarded as rent.⁷³ If there is an express agreement by the vendee in possession to pay rent until he takes title,⁷⁴ or to pay rent until a certain amount is paid by the vendee, upon which the land is to be conveyed by the vendor, the relation of the parties is that of landlord and tenant.⁷⁵ The vendee in possession at once becomes the tenant of the vendor where he fails to pay the first instalment of the price, where there is a provision in the contract of sale that on a default he shall pay rent.⁷⁶ But there is no presumption in the absence of a clear understanding to that effect that upon the default of the vendee in possession to pay rent, he shall thereupon become a tenant of the vendor. The fact that a note which is given for a portion of the purchase money contains a statement that it is for rent will not alone create any presumption that the relation of landlord and tenant existed between the parties.⁷⁷ But the fact that a contract of sale speaks of a part of the consideration to be paid by the vendee in possession as rent does not necessarily transform it into a lease.⁷⁸ If the vendee is let into possession, under an agreement by him to pay the purchase money at a future date, and to pay rent in the meantime, the rent is obviously more in the nature of interest on the purchase money than rent and, as the relation of landlord and tenant does not

⁷² Foster v. Goodwin, 82 Ala. 384, 2 So. Rep. 895. Compare *contra*, Green v. Deitrich, 114 Ill. 636, 642, 3 N. E. Rep. 800, in which the language of the contract was very peculiar.

⁷³ Barrett v. Johnson, 2 Ind. App. 25, 27 N. E. Rep. 983.

⁷⁴ Jackson v. Niven, 10 Johns. (N. Y.) 335.

⁷⁵ Nobles v. McCarty, 61 Miss.

456, 458. See Nestal v. Schmid, 39 N. J. Law, 686.

⁷⁶ Block v. Smith, 61 Ark. 266, 32 S. W. Rep. 1070; Chambers v. Irish (Iowa, 1906), 109 N. W. Rep. 787.

⁷⁷ Quettermous v. Hatfield, 54 Ark. 16, 14 S. W. Rep. 1096; Walters v. Myer & Co., 39 Ark. 560.

⁷⁸ Smith v. Mabery, 61 Ark. 515, 33 S. W. Rep. 1068.

exist, the party to whom it is due cannot collect it by any of the usual methods for collecting rent.⁷⁹ So, also, an agreement between the vendor and the vendee that the purchase money, which is to be paid in instalments, may be collected by the vendor, as they become due, by distress or otherwise, does not alone create the relation of landlord and tenant.⁸⁰ A vendee who goes into possession with the consent of the vendor under an agreement with the latter that he will pay him interest on the purchase money at so much per annum while he is in possession before conveyance and *a fortiori* after conveyance does not by that fact alone become a yearly tenant. He may, however, be regarded as a tenant at will and on the rescission of the contract because he fails to pay the interest or the purchase money he may be ousted on an entry or demand of possession. For the payment of interest under such circumstances, though yearly, is not for the use of the land but for the forbearance of the vendor in waiting for the money. But where a yearly payment other than interest is made which is to go to the vendor as rent in case the contract of sale is not consummated, but which is to apply to the purchase price if the vendee takes a conveyance, a tenancy from year to year is created.⁸¹ If the facts proved are such that, taken with the express language of the contract, it appears that the relation between the vendee in possession and his vendor is that of landlord and tenant, the vendor has the same remedies against his vendee as a landlord will have against a tenant. The vendor may then enforce a landlord's statutory lien for rent on the crops grown by his vendee while he was in possession of the premises.⁸² Under such circumstances, the lien of the vendor for rent is superior to that of the chattel mortgagee or

⁷⁹ Walters v. Myer & Co., 39 Ark. 560, 567; Bissell v. Erwin's Heirs, 10 La. 524; Quettermous v. Hatfield, 54 Ark. 16, 14 S. W. Rep. 1096.

⁸⁰ Sackett v. Barnum, 22 Wend. (N. Y.) 605. The same ruling was had where the vendee in possession of land which sold on long credit was bound to pay each year, in addition to the purchase price,

"so much as the one-half of all crops on said land shall amount to." Moen v. Lillestal, 5 N. D. 327, 65 N. W. Rep. 694.

⁸¹ Saunders v. Musgrave, 6 B. & C. 524; Parton v. Smith, 66 Iowa, 75; Eaton v. Hunt, 20 Ky. Law Rep. 860, 47 S. W. Rep. 763.

⁸² Waite v. Corbin, 109 Ala. 154, 19 So. Rep. 505.

judgment creditor of a vendee who is in possession of the land as a tenant.⁸³

§ 226. **The entry of vendee under a parol agreement to purchase.** A purchaser under a void parol contract to purchase who is put in possession of the premises by the vendor is not liable for the rent until his right to enforce the contract shall have been denied by the vendor. So long as he holds possession with the consent of the vendor, his right to the profits and rent will be presumed.⁸⁴ A parol contract of sale under which the vendee has entered may be valid as a lease though unenforceable as a contract to convey.⁸⁵ The general rule in all cases of an entry by the vendee under a parol contract to sell land is that the relation of landlord and tenant does not exist between him and the vendor. The vendee in possession is not therefore estopped to dispute the vendor's title.⁸⁶ nor is he on the other hand, entitled as a tenant to a notice to quit.^{86a}

§ 227. **The vendor of land continuing in possession after his conveyance of the title.** The mere fact taken alone that the vendor retains the possession of the land after he has conveyed title to the vendee, does not, it has been held, create by implication, the relationship of landlord and tenant between the parties to the contract of sale so as to give the vendee the right to recover from the vendor for the use and occupation of the land.⁸⁷ There are, however, many cases which hold to the contrary and the weight of the authorities is directly opposed to this rule. So, it has been held several times that the remaining in the possession of the land by the vendor after the conveyance of the title by him alone raises a presumption that he continues in possession as a tenant of the vendee.⁸⁸ However, this presumption is

⁸³ *Reddick v. Hutchinson*, 94 Ga. 675, 21 S. E. Rep. 712.

⁸⁴ *Fox v. Longley*, 1 A. K. Marsh. (Ky.) 388; *Kay v. Curd*, 6 B. Mon. (Ky.) 100.

⁸⁵ *Vick v. Ayres*, 56 Miss. 670, in which the vendee expressly agreed to pay rent if he should not pay the purchase money in one year.

⁸⁶ *Hough v. Dumas*, 4 Dev. & Bat. L. (N. C.) 328.

^{86a} *Chilton v. Niblett*, 3 Humph. (Tenn.) 404.

⁸⁷ *Greenup v. Verner*, 16 Ill. 26, 27; *Tew v. Jones*, 13 M. & W. 12.

⁸⁸ *Prichard v. Tabor*, 104 Ga. 64, 30 S. E. Rep. 415; *Sherebourne v. Jones*, 20 Me. 70; *Larrabee v. Lumbert*, 34 Me. 79, 80, 81; *Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; *Wood v. Hyatt*, 4 Johns. (N. Y.) 313; *Hodges v. Gates*, 9 Vt. 17.

always rebuttable by proof of facts which show or tend to show an intention that the relation of landlord and tenant shall not exist between the parties. Thus, for example, the vendor continuing in possession after his conveyance will be permitted to prove that his deed, though it was an absolute conveyance upon its face, was in fact given to secure his debt; that the creditor or grantee in the deed had refused to give a bond to re-convey the property, and that the debt had been paid and that hence there should be a re-conveyance.⁸⁹

⁸⁹ *Larrabee v. Lumbert*, 34 Me. 79, 81; *McCormick v. Herndon*, 26 Wis. 449.

CHAPTER X.

THE FORM AND EXECUTION OF LEASES.

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§ 266. The effect of the record as notice.

267. As against the creditors of the lessor and persons claiming under him.

268. The effect of recording a lease which is not required to be recorded.

§ 228. **Scope of this chapter.** In this chapter it is proposed to treat of the execution of a formally written lease. Under the heading of execution will be discussed the signing, sealing, attestation, delivery and acceptance of the writing. Inasmuch as a lease in writing is merely a contract in writing for the use of the parties concerned, the rules regulating the execution of written contracts are usually to be applied where the execution of a written lease is under consideration. The case therefore that applies to the execution of written contracts generally may safely be consulted and cited in all questions involving the form and execution of written leases. Many such cases have been cited in the notes which are appended to the text of this chapter.

§ 229. **The formal requisites of a lease.** There are certain elements which must exist in every case in order that a writing shall constitute a valid lease. *First*, there must be a lessor who is competent to make a lease, that is to say, the lessor must have the same capacity to contract in writing which is usually required in other cases. The capacity of the lessor to make a lease will be determined by the same rules which are recognized in the case of all other written contracts. *Second*, there must be a lessee who is capable to contract with the lessor. The same rules which are used to determine the capacity of the lessor will be implied to determine the capacity of the lessee. *Third*, there must be a subject matter which is capable of being leased. Usually, the subject of a lease is land or other things, and articles of property of a real or personal nature. *Fourth*, if, by statute, the lease is required to be by deed, the execution, delivery, etc., of the deed must conform to the rules which regulate the execution and delivery of deeds, that is to say, the writing must be sealed; must contain a definite and certain description of the parties and of the things demised; must be sealed and delivered, and, in certain cases, it must be acknowledged and recorded. *Fifth*, where a term of years is created by a lease, the term must have a fixed commencement and must be definite

in length. This need not be expressly stated in the writing but is permitted to be ascertained by parol evidence. Thus, as is subsequently explained, the term may be for a fixed number of years or may be for a term not stated in years, but determinable by the happening of some contingent event. *Sixth*, at the common law where the lease was for a freehold, livery of seizin was required and where the lease was for a term of years, an attornment was indispensable but these ceremonies have been abolished for many years, and, in the United States at least, are not requisite in the case of leases. *Seventh*, there must usually be an acceptance of the term by the lessee.

§ 230. **General rules of the law of contracts as to signatures.**

Aside from the special topic of leases, it is the rule in the case of a contract which is not required to be signed by the party to be charged under the statute of frauds, that the mere fact that a party to the contract has not signed it, does not exempt him from liability under it where he has received a benefit from it.¹ The case is much stronger against a party where his name appears in the body of the contract, as being a party to it. Even if his name does not appear in the contract, if it appears that he knew of its terms and acted in accordance therewith he will be liable. The circumstance that the contract is in his writing, together with the appearance of his name in it is almost conclusive against him.² These rules of the general law of contract as sustained by the cases which are cited in the notes are all of value in connection with the construction of leases. Thus, a lease made in writing which is not required by the statute of frauds to be in writing, is binding on a party to it, though he has not signed it, if he shall, being the landlord, receive the rent under it, or being the tenant, he shall enter upon the occupation of the premises.³ For it is a general rule which is

¹ Henry v. Allen, 49 Ark. 122, 4 S. W. Rep. 201; Kieth v. Kerr, 17 Ind. 284; Smith v. Morse, 20 La. Ann. 220; Jeffry v. Underwood, 1 Ark. 108; Pennington v. Baehr, 48 Cal. 565; Curds v. Forts, 9 Ky. 43; Basham v. Commonwealth, 76 Ky. 36; Gable v. Brooks, 48 Md. 108; Rundell v. La Fleur, 88 Mass. 480; Dodd v. Butler, 7 Mo. App. 583;

Claflin v. Hoover, 20 Mo. App. 583; Hinsaman v. Hinsaman, 52 N. C. 510.

² Noe v. Hodges, 22 Tenn. 162; Young v. Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456.

³ Magoon v. Minnesota Transfer Packing Co., 34 Minn. 434, 26 N. W. Rep. 235.

of particular value in connection with leases, that a contract which is intended to be signed by both parties but is only signed by one of them becomes in all respects binding upon the other who accepts it by his conduct in deriving a benefit from it with knowledge of its existence.⁴ The requirement of the statute of frauds that a lease shall be signed by the party to be charged, is satisfied if the lessee's or lessor's name written by himself, appears in any part of the lease, particularly in the clause containing the usual description of the parties.⁵ Where a lease is executed by two parties, and it is retained by the lessor to have it also executed by his wife, who subsequently refuses to sign it, and a third person in ignorance of the lease, purchases the farm as a result of which the unexecuted lease was destroyed, the lease itself is void for lack of mutuality.⁶

§ 231. **The signature to a lease by the tenant only.** Where the statute of frauds requires the lease to be in writing, a lease signed by the lessor only, if accepted and possession taken under it by the lessee against the lessor, is good.⁷ A lease signed by the tenant only, if not accepted or ratified by the landlord in writing, is not binding on the tenant and the landlord cannot sue and recover upon the covenant to pay rent therein contained.⁸ If the

⁴ *Reedy v. Smith*, 42 Cal. 245; *Bell v. Byerson*, 11 Iowa, 233, 77 Am. Dec. 142; *Dows v. Morse*, 62 Iowa, 231, 17 N. W. Rep. 495; *Fairbanks v. Meyers*, 98 Ind. 92; *Young v. Ward*, 33 Me. 359; *Griffin v. Bristol*, 39 Minn. 456, 40 N. W. Rep. 523; *Berner v. Bagnell*, 20 Mo. App. 543; *Dutch v. Mead*, 36 N. Y. Super. Ct. 427; *Reynolds v. Welsh*, 8 N. Y. St. Rep. 404; *Grove v. Hodges*, 55 Pa. St. 504; *Campbell v. McFaddin*, 71 Tex. 28, 9 S. W. 138.

⁵ *Traylor v. Cabanne*, 8 Mo. App. 131, 133; but see *Combs v. Midland Trans. Co.*, 58 Mo. App. 112, 114 (Cons. Missouri R. S. 1889, § 6371).

⁶ *Tatham v. Lewis*, 65 Pa. St. 65, 27 L. I. 77. "The lease was clearly not binding on the lessee. He could not have been compelled to

accept it without execution by the wife; neither could the lessor have been compelled to deliver it—it must be mutually binding on both parties or neither. The lessor had a perfect right, when his wife refused to execute the lease to cancel and destroy the instrument—if the lease had been a valid and subsisting lease, complete by delivery, without joinder of the wife, the destruction of it by the lessor could not destroy the estate or term."

⁷ *Carnegie Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317, 27 Atl. Rep. 951, 954; *Bergner v. Palethrop*, 2 W. N. C. (Pa.) 297, 23 Pitts. L. J. 103, 8 Leg. Gaz. 35.

⁸ *Jennings v. McComb*, 112, Pa. St. 518, 4 Atl. Rep. 812, 17 W. N. C. 466, 34 Pitts. L. J. 75.

landlord, knowing that a person is in possession of the premises under the lease which is signed by the tenant and not by the landlord, accepts rent from him as such he cannot thereafter evade his responsibility as a landlord by showing that the lease was not signed by him. If a landlord permits another person to enter and occupy as a tenant, premises owned by him and receives rent from the occupant as a tenant under a lease signed only by the tenant but which has been brought to the knowledge of the landlord, he is estopped to impeach the lease on the ground that he has not signed it. On the other hand, a lease which is not signed by the landlord is binding on the lessee who goes into possession under it.^{8a} And the landlord may then recover from him the rent which he has agreed to pay. The lease having been executed by the parties, the statute of frauds does not apply to such a case.^{8b} So, where a lessee occupies the premises under a written lease and pays rent for several months under the instrument which is signed by himself and not by his lessor, which purports to be a lease for one year, the lease is valid as a parol lease for one year,^{8c} and the tenant is a tenant for one year, though the rent is payable monthly.

§ 232. **The signature by the lessor only.** In some cases it has been held that a lease or any other contract which is required by law to be signed by the parties is void if signed by the lessor only. A lease signed by the lessor, but not by the lessee and not accepted nor ratified by him in writing, is not valid as against the lessee where it comes within the provision of the statute of frauds, and the lessee cannot be sued in covenant thereon.⁹ The mutuality of obligation, however, which is lacking where a lessee has failed to sign a lease may be supplied by his conduct in relation thereto. This is the outcome of the principle of estoppel by which a party who has voluntarily derived benefits from a contract which was not legally binding on him is denied the right subsequently to repudiate the contract. For a lessee by

^{8a} *Baragiano v. Villani*, 117 Ill. App. 372; *Evans v. Conklin*, 71 Hun, 536, 24 N. Y. Supp. 1081; *Mayer v. Moller*, 1 Hilt. (N. Y.) 491; *Kauer v. Leahy*, 15 Pa. Co. Ct. Rep. 243.

^{8b} *Lagerfelt v. McKie*, 100 Ala. 430, 14 So. Rep. 281; *Nicholls v.*

Barnes, 39 Neb. 103, 57 N. W. Rep. 990.

^{8c} *Nicholls v. Barnes*, 39 Neb. 103, 57 N. W. Rep. 990.

⁹ *Jennings v. McComb*, 112 Pa. St. 518, 4 Atl. Rep. 812, 17 W. N. C. 466, 34 Pitts. L. J. 65.

accepting a written lease, particularly one which is under the seal of the lessor, and entering into possession thereunder, becomes liable, if not for rent,¹⁰ then for the value of the use and occupation of the property for such period as he is in possession. And apparently the lessee, by the acceptance of the lease and possession under it, also becomes liable to the lessor for all the covenants which would have been binding upon him had he signed the lease.¹¹ Whether the tenant is liable for the rent on his covenant, or whether he is liable for the use and occupation of the premises is, in modern practice at least, of very little importance. The principal question is one of the election of remedies. If the landlord sues for rent or for damages for the breach of any covenant alleging a written lease and the proof shows a lease signed by the landlord and not by the tenant, the landlord may be non-suited. So, it has been held that an action on the covenant to pay rent will not lie against the tenant on a lease alleged to be in writing but which is sealed and subscribed by the landlord only.¹² But the current of the modern decisions is certainly against this proposition and most of the courts would undoubtedly hold in an action brought by the landlord against the tenant on a written lease, that the latter was estopped to allege or prove that he was not bound by the lease because he had not signed it, if it appears that he entered on the premises and paid rent according to its terms. For a lease executed by the lessor is not rendered invalid merely because it was not signed by the lessee, from the fact that it contained independent covenants apparently intended to be assented to by the lessee's sign-

¹⁰ *Pepper's Adm'r v. Harper*, 20 Ky. Law Rep. 837, 47 S. W. Rep. 620.

¹¹ *Trapnall v. Merrick*, 21 Ark. 503; *Baltimore & O. R. R. Co. v. Winslow*, 18 App. D. C. 438; *Fields v. Brown*, 188 Ill. 111, 58 N. E. Rep. 977; *Henderson v. Virden Coal Co.*, 78 Ill. App. 437; *McFarlane v. Williams*, 107 Ill. 33, 43; *Doxey Estate v. Service* (Ind. App. 1902) 65 N. E. Rep. 757; *Libbey v. Staples*, 39 Me. 161, 166; *Rice v. Brown*, 81 Me. 56, 16 Atl. Rep. 334; *Zink v. Bohm*, 3 N. Y.

Super. Ct. 4; *Round Lake Ass'n v. Kellogg*, 141 N. Y. 348, 36 N. E. Rep. 326, 327; *Filton v. Hamilton City*, 6 Nev. 196; *Carnegie N. G. Co. v. Philadelphia Co.*, 158 Pa. St. 317, 325, 27 Atl. Rep. 951; *Braman v. Dodge*, 100 Me. 143, 60 Atl. Rep. 799; *Bergner v. Palethorp*, 2 W. N. C. 297; 23 Pitts. L. J. 103, 8 Leg. Gaz. 35; *Jenning v. McComb*, 112 Pa. St. 518, 4 Atl. Rep. 812; *Traylor v. Cabanne*, 8 Mo. App. 131.

¹² *Trustees of Section 16 v. Spencer*, 7 Ohio, 149.

ing the lease and the landlord may waive his right to have the signature of the lessee to the lease and the fact that he put it on record would justify a presumption that he had done so.¹³ The owner of real estate may transfer his land by a lease executed by him alone, and the lease will be effectual, although it contains covenants for the execution of the lessee by signing and sealing but which are not in fact signed by the latter. The lessor may waive the covenant in the part of the lessee.¹⁴

§ 233. **The signature to a lease affixed by a surety.** A person who signs a lease as surety for the lessee is not liable jointly with the lessee in an action to recover rent or to enforce a covenant of the lessee. He undertakes to pay rent or damages only in case the lessee does not and his liability is not contemporaneous with that of the lessee but arises only when the liability of the lessee has been fixed. The contracts of the two are separate and distinct and the general rules and principles of sureties are applicable including that section of the statute of frauds which requires the consideration in an agreement of a surety to be ex-

¹³ Libbey v. Staples, 39 Me. 166-168.

¹⁴ Libbey v. Staples, 39 Me. 166; Braman v. Dodge, 100 Me. 143, 60 Atl. Rep. 799. In Jennings v. McComb, 112 Pa. St. 518, 4 Atl. Rep. 812, the law is said to be that a plaintiff may sustain an action of covenant on a contract though it be so defectively executed that he could not be sued in covenant on the lease. The basis of this principle is said to be the general rule that a party who has not signed a contract makes himself liable by accepting it when it is signed by the other party. But this does not necessarily mean that both parties to the contract have the same remedy against the other. The one who has signed may be liable on a covenant. The one who has not signed can only be liable in assumpsit. In the case of a lease not signed by the lessor but signed by the lessee it

was held that the latter could not be sued on the covenant to pay rent though he had entered into possession because no term had been created to which the covenant to pay rent is annexed and during which it operates. There being no term there can be no covenant to pay rent. If there be no lease there is no covenant. See, also, Pitman v. Woodbury, 3 Exch. 11.

A lessee is not released from the obligation of his lease because he does not seal it where the lessor signed and sealed it, or the lessee signed it without sealing it. Such a contract is equivalent to two instruments, one containing covenants or promises under seal, and the other containing promises not under seal, each being a sufficient consideration for the other, each would be valid. Rice v. Brown, 81 Me. 56, 62, 16 Atl. Rep. 334.

pressed. No consideration being expressed, the contract is void and the person who signed as surety is bound neither as principal nor as surety.¹⁵

§ 234. **The necessity for and the form of seals.** By the ancient common law an estate of freehold could be conveyed only by livery of seizin or by deed, meaning thereby a writing under seal. Livery of seizin having been abolished both in England and in America, the sole remaining method of conveying a freehold interest in land is therefore by deed. This rule of the common law as to the conveyance of freehold estates has been affirmed by statute in many of the states. Leases for years being regarded as mere chattels, are valid when in writing though not under seal unless sealing is required by the terms of some statute.¹⁶ For in a few of the states, leases in excess of a specified number of years must be under seal.¹⁷ At the common law, where a seal is required, it must be of wax or wafer or some other adhesive substance which is capable of receiving an impression.¹⁸ By statute in many, if not in all the states, this requirement of the common law has been abrogated so that it has come to be the almost universal rule that a stamp or impression made upon the instrument itself, or a scroll or circle of ink, or certain words or letters written therein is taken and regarded as a seal.¹⁹ In two of the states where such statutes have been

¹⁵ *Evans v. Conklin*, 71 Hun, 536, 539, 24 N. Y. Supp. 1081; *Decker v. Gaylord*, 8 Hun, 111; *Gould v. Maring*, 28 Barb. (N. Y.) 444; see, also, *DeRidder v. Schermerhorn*, 10 Barb. (N. Y.) 638; *Allen v. Fosgate*, 11 How. Pr. 218.

¹⁶ *Crescent City Wharf & Lighterage Co. v. Simpson*, 77 Cal. 286, 15 Pac. Rep. 426; *Lake v. Campbell*, 18 Ill. 106; *Borggard v. Gale*, 107 Ill. App. 128; *De Loge's Adm'r v. Hall*, 31 Mo. 473; *Jones v. Barnes*, 45 Mo. App. 590; *Gay v. Ihm*, 3 Mo. App. 588; *Den v. Johnson*, 15 N. J. Law, 116; *Fougera v. Cohn*, 2 City Ct. Rep. (N. Y.) 253; *O'Brien v. Smith*, 13 N. Y. Supp. 408, 410, 34 N. Y. St. Rep.

41; *Stoddard v. Whiting*, 46 N. Y. 627, 633.

¹⁷ Seven years in Massachusetts and Maryland, five years in Virginia, two years in Florida, one year in Delaware, Rhode Island and Vermont. In Wisconsin a seal is unnecessary to a lease and does not raise the same above the dignity of an instrument not under seal. *Woolsey v. Henke*, 125 Wis. 134, 103 N. W. Rep. 267.

¹⁸ *Beardsley v. Knight*, 4 Vt. 471, 479; *Warren v. Lynch*, 5 Johns. (N. Y.) 237, 239; *Bank v. Gray*, 2 Hill (N. Y.) 227.

¹⁹ *Bohannous v. Lewis*, 3 Mon. (Ky.) 376; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234, 246; *Hen-*

enacted it must be proved by the language of the writing that the party meant the scroll or writing to be his seal.²⁰ As a general rule at the present time, where from the attestation clause it appears to have been the intent and purpose of the parties to execute a sealed instrument, anything adhering to the paper or any words written upon it at or near the place where the seal is ordinarily affixed which can with a reasonably wide stretch of the imagination, be regarded as such, will at least *prima facie* be presumed to be a seal and to have been affixed with an intention to seal the writing. And where several persons execute a writing it is not necessary that each should have a separate seal, though two or more may bind themselves severally by one seal if it shall appear that such was their intention.²¹

§ 235. **The attestation of leases.** In the absence of an express statutory provision a written lease, though executed under seal, is not required to be attested by subscribing witnesses. Hence a lease, though under seal, is not invalid in any way be-

dee v. Pinkerton, 14 Allen (Mass.) 381; Royal Bank v. Railroad & Depot Co., 100 Mass. 444, 445; Bates v. Boston & N. Y. R. R. Co., 10 Allen (Mass.) 251; Relph v. Gist, 4 McCord (S. C.) 267; Alexander v. Jameson, 5 Binn. (Pa.) 238, 243, 244; Bradfield v. M'Cormick, 3 Blackf. (Ind.) 161, 162.

²⁰ Austin v. Whitlock, 1 Munf. (Va.) 487; Lee v. Adkins, 1 Minor (Ala.) 187.

²¹ Bohannous v. Lewis, 3 T. B. Mon. (Ky.) 376, 378; MacKay v. Bloodgood, 9 Johns. (N. Y.) 285, 287; Yarborough v. Monday, 2 Dev. (S. C.) 493; Townsend v. Hubbard, 4 Hill (N. Y.) 351; University of Vermont v. Joslyn, 21 Vt. 52; Ball v. Dunsterville, 4 T. R. 313. By the English statute 8 & 9 Vict., c. 106, S. 3, a lease required by law to be in writing, is now required to be by deed and otherwise it is void. In construing the statute, it has been held

that though the lease being not by deed is void, yet it may be valid as an agreement indicating the premises upon which the tenant holds as tenant from year to year. Tress v. Savage, 4 El. & Bl. 36, 2 C. L. R. 1315, 23 L. J. Q. B. 339, 13 Jur. 680, 2 W. R. 564; Hayne v. Cummings, 16 C. B. (N. S.) 421, 10 Jur. (N. S.) 773, 10 L. T. 341; Tidey v. Mollett, 16 C. B. (N. S.) 298, 33 L. J. C. P. 235, 10 Jur. (N. S.) 800, 10 L. T. 380, 12 W. R. 802; Bond v. Rosling, 1 B. & S. 371, 30 L. J. Q. B. 227, 8 Jur. (N. S.) 78, 4 L. T. 442, 9 W. R. 746. And the statute does not prevent the instrument, which as containing words of present demise and not being under seal is void as a lease from being enforced in equity. Parker v. Taswell, 2 De G. & J. 559, 27 L. J. Ch. 812, 4 Jur. (N. S.) 1006, 6 W. R. 608.

cause it is not attested and it may be enforced either at law or in equity on proof of its execution, by any relevant evidence. The purpose of the attestation is merely to provide a simple method of proof, and if the parties wish to dispense with this method of proof they may do so.²² If a statute requires that an instrument conveying land must be attested by two witnesses a lease attested by one witness only, conveys no interest and is not entitled to record. If it is recorded without proper attestation the record confers no validity upon it.²³ In some of the states it is expressly provided by statute that a deed to be valid must be attested by at least two witnesses.²⁴ Hence, in these states a lease executed by deed would be invalid unless attested according to statute. A statute which provided that a conveyance of freehold interest in land must be attested does not require that leases must be attested. The construction which has just been stated in regard to the attestation of deeds will be applicable to the attestation of leases. So, also, the competency of attesting witnesses to leases is to be determined by the same rules which apply to the competency of witnesses to deeds. Thus, as the grantee in a deed is not a competent witness to the deed, so by analogy, a lessee is not a competent attesting witness to the lessor's execution of a lease.²⁵ Usually, disinterested persons are required as attesting witnesses.²⁶ The wife of a lessee

²² *Wiswall v. Ross*, 4 Port (Ala.) 321; *Cocke v. Brogan*, 5 Ark. 693; *Jackson v. Allen*, 30 Ark. 110; *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506; *Johnson v. Jones*, 87 Ga. 85, 13 S. E. Rep. 261; *Dundy v. Chambers*, 23 Ill. 369; *Fitzhugh v. Croghan*, 25 Ky. 429, 19 Am. Dec. 139; *Dole v. Thurlow*, 53 Mass. 157, 166; *Godfroy v. Dispro* (Mich.) Walk. Ch. 260; *Price v. Haynes*, 37 Mich. 487; *Pearson v. Davis*, 41 Neb. 608, 59 N. W. Rep. 885; *Forsaith v. Clark*, 21 N. H. 409; *Van Soligen v. Town of Harrison*, 39 N. J. Law, 51; *Wood v. Chapin*, 13 N. Y. 509; *Long v. Ramsay* (Pa.) 1 Serg. & R. (Pa.)

72; *Markley v. Swartzlander*, 8 Watts & S. 172; *Crockett v. Campbell*, 21 Tenn. 411; *Mauley v. Zeighler*, 23 Tex. 88; *Quinney v. Denny*, 18 Wis. 485; *Leinenkugel v. Kehl*, 73 Wis. 238, 40 N. W. Rep. 683.

²³ *Langmede v. Weaver*, 65 Ohio St. 17, 33, 60 N. E. Rep. 992.

²⁴ *French v. French*, 3 N. H. 234; *Stone v. Ashley*, 13 N. H. 38; *Patterson's Lessee v. Pease*, 5 Ohio, 190; *Hendricks v. Huffmeyer* (Tex.), 27 S. W. 777; *Day v. Adams*, 42 Vt. 510.

²⁵ *Coleman v. State*, 79 Ala. 49.

²⁶ *Winsted Saving Bank & Building Ass'n v. Spencer*, 26 Conn. 195.

or of a lessor would not be a competent witness to attest the lease.²⁷

§ 236. **The necessity for an acknowledgment.** As between the parties to it, and aside from any question of record, an unacknowledged lease is absolutely valid in the absence of an express statutory provision to the contrary.²⁸ So, generally a lease, though it is unacknowledged, is good as against subsequent purchasers, lessees or incumbrancers with actual knowledge of it.²⁹ If, however, a statute expressly requires that a lease for a term of years shall be acknowledged or attested, a lease not thus acknowledged or attested is void.³⁰ Hence, where it is ex-

²⁷ *Corbett v. Norcross*, 35 N. H. 99. Where there are no attesting witnesses to a lease the execution may be shown either by proof by some person who saw the party sign it or by proving the party's handwriting. If the instrument purports to have been attested, the witnesses must be called or their absence accounted for. Though attestation may be dispensed with, it is proper to add that, as it affords such an easy and effectual mode of proof as may enable a lessee to supply the want of an acknowledgment and attain the recording or registration of his lease, where and acknowledgment is lacking, and adds so much to the credit of a lease or deed, every conveyancer of common prudence, and every lessee and grantee in the exercise of due care, will perceive the propriety of having his lease or deed attested. *Dole v. Thurlow*, 53 Mass. 157, 163, which cites *Long v. Ramsay*, 1 S. & R. (Pa.) 72; *Garrett v. Lister*, 1 Lev. 25; *Swire v. Bell*, 5 T. R. 371.

²⁸ *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. Rep. 111; *Lake v. Campbell*, 18 Ill. 106; *Wihelm v. Mertz*, 4 G. Greene (Iowa) 54, 55; *Simpson v. Mundee*, 3 Kan. 172;

Cable v. Cable, 146 Pa. St. 451, 23 Atl. Rep. 223, 29 W. N. C. 284; *Clark v. Gellison*, 20 Me. 18; *Blazier v. Johnson*, 11 Neb. 404, 9 N. W. Rep. 543; *Weaver v. Coumbe*, 15 Neb. 167, 171, 17 N. W. Rep. 357; *Stone v. Stone*, 1 R. I. 425; *Town of Lemington v. Stevens*, 48 Vt. 38; *Buswell v. Marshall*, 51 Vt. 87; *McGlanflin v. Holman*, 1 Wash. St. 239, 24 Pac. Rep. 439; *Schulte v. Schering*, 2 Wash. St. 127, 26 Pac. Rep. 78.

²⁹ *Bass Lake Co. v. Hollenbeck*, 5 Ohio Cir. Dec. 242.

³⁰ A lease or license of land for the production of oil and natural gas is within a statute requiring certain leases of an estate or interest in real property to be signed by a lessor, and to be acknowledged by him in the presence of two witnesses, who are to subscribe it as attesting witnesses. The fact that taking natural gas from land was a new use of land arising since the statute was passed is not material. Such an instrument being defectively executed is therefore not a lease at all. It is totally void and cannot be given any validity for a portion of the term. Placing it on record gives the lessee no rights under it.

pressly provided by a statute that instruments in writing conveying interests in land shall be attested or acknowledged by the persons making the same, an unattested or unacknowledged lease is void even as between the parties to it. Such a writing conveys no interest to the lessee nor can the lessor enforce any covenant therein as against the lessee.³¹ A statute which provides that any deed or other instrument in writing shall be acknowledged by the maker in the presenee of witnesses, includes a lease which is void and conveys nothing if it is not acknowledged.³² In Washington, by statute a lease in writing, if unacknowledged, is valid for one year only. The part performance by the lessee of a void unacknowledged lease for a longer period, does not validate it.³³ Though a lease is defective under a statute providing that it shall be acknowledged, yet the landlord may recover rent if the tenant has entered and had possession.³⁴ And where a statute provides that no estate in the real property of a married woman passes by her grant or by any instrument unless the same is acknowledged by her, her lease must be acknowledged.³⁵ A lease for life of the estate of a married woman signed by her, but not acknowledged as required by statute, is void.³⁶ So a deed by which a husband and his wife lease her interest in land is void, unless it is acknowledged by her where the statute expressly requires that the wife

The record is not notice to third parties. *Langmede v. Weaver*, 65 Ohio St. 17, 33.

³¹ *Richardson v. Bates*, 8 Ohio St. 257, 261; *Johnson's Lessee v. Haines*, 2 Ohio, 55; *Abbott v. Bosworth*, 36 Ohio St. 605 (holding that the lessee acquires only an equitable title). See *Anderson v. Critcher*, 11 Gill & J. (Md.) 450, 37 Am. Dec. 72, and *Stone v. Stone*, 1 R. I. 425, 428.

³² *Richardson v. Bates*, 8 Ohio St. 257, 261; *Ackinson v. Dailey*, 1 Hammond (Ohio) 367.

³³ *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. Rep. 322.

³⁴ *Budgmans v. Wells*, 13 Ohio, 43; *Newstedt v. Scarborough*, 13 Ohio Dec. 327. A lease for so long

as the lessors shall continue in ownership does not come within a statute requiring the acknowledgment of an assignment of a lease for a longer time than one year, since the lessor may remain in possession less than a year. *Rickard v. Dana* (Vt.), 52 Atl. Rep. 113.

³⁵ *Carlton v. Williams*, 77 Cal. 89, 19 Pac. Rep. 185, 11 Am. St. Rep. 243. In Illinois under the statute, it has been held that a lease executed by a married woman, though unacknowledged, is binding on her. *Bradshaw v. Atkins*, 110 Ill. 323.

³⁶ *Worthington's Lessee v. Young*, 6 Ohio, 313, 335.

shall acknowledge it.³⁷ Under the statute providing for the recording and registering of deeds, it is usually absolutely essential that the paper should be properly acknowledged before it can be recorded. Where this is the case, the record of an unacknowledged deed or other instrument, or of one defectively acknowledged, does not make the deed or instrument notice to subsequent purchasers, and hence the recording confers no priority upon the party claiming rights under the instrument.³⁸ A statute which merely provides that conveyances of land must be acknowledged in order to be valid does not affect a lease, for the term "land" does not comprehend chattel interests as leases for years. Such leases while they are interests in land are distinct from it and collateral to it.³⁹

§ 237. **The description of the premises.** It is important and in fact in most instances indispensable that the premises leased should be properly described in apt words and clear terms so as to be easy of identification. If the description is vague and indefinite or if the premises are not described with such a reasonable degree of certainty that they are capable of identification, the lease may be void.⁴⁰ Thus, it seems a description of the land leased by metes and bounds, but not containing language indicating the township, range, county, or state in which it is located is void for uncertainty and the lessee cannot be

³⁷ *George v. Goldsby*, 23 Ala. 326.

³⁸ *Haskill v. Sevier*, 25 Ark. 152; *Herndon v. Kimball*, 7 Ga. 432, 50 Am. Dec. 406; *Wickersham v. Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Graves v. Graves*, 6 Gray, 291; *Work v. Harper*, 24 Miss. 517; *Heelan v. Hoagland*, 10 Neb. 511, 7 N. W. Rep. 282; *Langmede v. Weaver*, 65 Ohio St. 17, 33, 60 N. E. Rep. 992, 996; *Betz v. Snyder*, 48 Ohio St. 492, 28 N. E. Rep. 234; *McKean and Elk Land Co. v. Mitchell*, 35 Pa. St. 269, 78 Am. Dec. 335; *Cannon v. Demming*, 3 S. D. 421, 53 N. W. Rep. 863; *Hoisington v. Hoisington*, 2 Aiken

(Vt.) 235; *Cox v. Wayt*, 26 W. Va. 807.

³⁹ See *Stone v. Stone*, 1 R. I. 425, 428.

⁴⁰ *Dixon v. Finnegan*, 182 Mo. 111, 81 S. W. Rep. 449, 451; *Dingman v. Kelley*, 7 Ind. 717; *Reed v. Lewis*, 74 Ind. 433, 438; *Bailey v. White*, 41 N. H. 337; *Goodsell v. Rutland-Canadian R. Co.*, 75 Vt. 375, 56 Atl. Rep. 7; *Bingham v. Honeyman*, 32 Ore. 129, 51 Pac. Rep. 735; *Coppinger v. Armstrong*, 5 Ill. App. 637; *Hay v. Cumberland*, 25 Barb. (N. Y.) 594; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Proctor v. Pool*, 4 Dev. (N. C.) 370.

held for rent where he has never gone into possession.⁴¹ What will constitute such an uncertainty in the description of the premises as will invalidate the lease, depends usually on the language and circumstances of each case. Parol evidence is received under the general rules to identify the premises which are the subject-matter of the lease. A reference in the description to the premises as having been used for a particular business purpose or as having been occupied by the lessee or other person is usually sufficient to make the description certain with the aid of parol evidence.⁴² If the lessee enters into possession under the lease, he is liable for rent for the period of his occupation though the location of the premises does not appear in the lease,⁴³ or the description is in some respects insufficient.⁴⁴ Generally if the description affords means or suggestions of fact by which, with the invocation and aid of parol evidence, the premises may be identified, it is sufficiently certain, though in minor details it be erroneous or inconsistent.⁴⁵ If, in the description there is sufficient to enable one to ascertain with reasonable certainty what premises the parties to the instrument intended to lease, it will be ordinarily a sufficient description and that part of the description which is false may be disregarded. For it is ordinarily unwise to describe with undue particularity and minute detail, the demised premises by name, or boundary, or past or present ownership, use or occupation for where many facts are enumerated, false statements are apt to creep in or confusion to arise. Hence, the question may occur to what extent all these statements must be consistent with one another or to what extent general words of description are to give way to particular words.⁴⁶ A lease of "part of the third

⁴¹ *Bingham v. Honeyman*, 32 Oreg. 129, 51 Pac. Rep. 735.

⁴² *Andrew v. Carlilo*, 4 Colo. App. 336, 36 Pac. Rep. 66.

⁴³ *Whipple v. Shewalter*, 91 Ind. 114, 119, also holding it proper to admit parol evidence to identify the premises; *Lush v. Druse*, 4 Wend. (N. Y.) 313.

⁴⁴ *Hoyle v. Bush*, 14 Mo. App. 408; *Pierce v. Minturn*, 1 Cal. 470;

Bulkley v. Devine, 127 Ill. 406, 20 N. E. Rep. 16, 3 L. R. A. 330.

⁴⁵ *Vose v. Bradstreet*, 27 Me. 156, 172; *Worthington v. Hilyer*, 4 Mass. 196, 205; *Campbell v. Johnson*, 44 Mo. 247; *Eggliston v. Bradford*, 10 Ohio, 312, 316; *Putnam v. Bond*, 100 Mass. 58; *House v. Jackson*, 24 Oreg. 29, 32 Pac. Rep. 1027.

⁴⁶ Where land is leased in gross

story and attic over same" in an identified building is not so indefinite that it will be void where the tenant went into possession and occupied a part of the third story marked off by a partition.⁴⁷ So the description of the property demised as "314 acres out of the southern part of" a section is sufficient to convey the interest in the south half of the survey.⁴⁸ A reservation or exception of a

there can be no question that the land was less in quantity than is mentioned in the lease. *Leavitt v. Murray, Wright* (Ohio), 707. In *Dixon v. Finnegan*, 182 Mo. 111, 81 S. W. Rep. 449, 451, a description as "160 acres of land lying in M. county, Missouri, and situated in sections 3 and 4, in township 55, range 8," was held too indefinite and the lease was void. In *Bingham v. Honeyman*, 32 Oreg. 129, 51 Pac. Rep. 735, the court said "to give effect to a lease of real property it must describe the subject matter of the demise with reasonable certainty, either by express words or by reference to something by which its location can be ascertained, and the want of such a description will render the lease inoperative. No action for rent can be maintained on such a lease where there is no entry by the tenant. In this case the only points named in the description were the boundary lines of certain claims and low-water mark, the township range, county and state being omitted with nothing in the instrument to show where the claims were located. And though there is a reference to low-water mark there is no reference to any stream, lake or other body of water. If the claims had been designated as being in a certain county or locality the description might have been sufficient. But as it stands the de-

scription is clearly insufficient under the principle that the test for determining the sufficiency of a description is whether the property can be identified with reasonable certainty by a competent survey or from the description given. A lease of land "beginning 80 yards easterly of the southwest part of my farm" was held void in *Goodsell v. Rutland-Canadian R. Co.*, 75 Vt. 375, 56 Atl. Rep. 7. In this case the court took proof of extrinsic circumstances and the lessee having taken possession of land which he supposed was included in the lease, the court laid down the rule that under the circumstances of the case his possession was limited to the part actually occupied.

⁴⁷ *Appleton v. O'Donnell*, 173 Mass. 398, 53 N. E. Rep. 882.

⁴⁸ *Santa Rosa Irr. Co. v. Pecos River Irr. Co.* (Tex. Civ. App. 1906), 92 S. W. Rep. 1014. In the case of *Crabtree v. Miller*, 194 Mass. 123, 80 N. E. Rep. 225, the following clause descriptive of the demised house was construed: "Buildings numbered 625 to 631, inclusive, together with the basement under said premises, meaning thereby the entire buildings containing stores and all floors over said stores, meaning thereby all the real estate I now own on W. street, excepting the building known as the Park Theater." In this case the landlord also owned

certain number of acres out of the total number contained in a farm, does not render the lease void for uncertainty because the acres accepted are not specified in it. The right of selection belongs to the lessor though he is bound not to exercise it arbitrarily so as to interfere with the beneficial use or enjoyment of the balance of the farm by the tenant.⁴⁹ The careful and certain description of the premises demised is absolutely indispensable, not only for the purpose of identifying the premises, but also because of the rule that nothing passes by a lease except what is expressly described in it, or what is absolutely necessary to it. But the rule that the premises shall be described with certainty does not prevent a description which may have to be made certain by the use of parol evidence. Thus, a description of the property leased as "being the building now or lately occupied by A," or "the premises known as A farm," particularly if the locality as the town or city is designated in which the premises are located, is sufficiently certain because such a description, though vague furnishes facts by which the premises may be ascertained with certainty. This is a very familiar rule in the

several adjacent lots upon which there were a hotel and theatre with covered passage between the two. Over the passageway and lobby of the theatre were rooms which were used as rooms in the hotel. There were also other rooms in the theatre which were used in connection with the hotel. The passageway was also used as an exit from the theatre. The court in construing a lease of the hotel by the above description held that the tenant acquired no right in the court except to use it as an appurtenance to the hotel.

⁴⁹ *Jenkins v. Green*, 27 Beav. 437, 28 L. J. Ch. 817, 5 Jur. (N. S.) 304, 7 W. R. 304. A description of the premises as "Zeringue's Landing under Nine Mile Point" is sufficient where this name by common use has come to designate a particular place. *Wood v. Sala y Fabrigas*, 105 La. 1, 29 So.

Rep. 367. Thus a lease of the Jackson Ranch, situated in Sauvies Island, and with a reference to deeds from A. to B. in which the premises had been conveyed together with a statement of the quantity of land is sufficient. *House v. Jackson*, 24 Oreg. 89, 32 Pac. Rep. 1027. A description which bounds the leased premises by a line "commencing at low-water mark at the lower mouth of Big Creek" and running thence, etc., and back to the "starting point" is sufficient. *Fraser v. State*, 112 Ga. 13, 37 S. E. Rep. 114. On the other hand, a description "beginning 80 rods easterly of the southwest part of my farm and extending northerly to the north line of land owned by me" renders the lease void for uncertainty. *Goodsell v. Rutland-Canadian R. Co.*, 75 Vt. 375, 56 Atl. Rep. 7.

construction of written instruments. The practice is to admit parol evidence to show the former or present occupancy of the premises, or to show the name by which they were known and when these facts are ascertained the description becomes certain. So, a description of the premises demised as certain premises conveyed to the lessor by a person named is good whether the deed of conveyance is referred to in the lease or not. If the deed is referred to it becomes relevant by this reference, and is in theory a part of the lease. Such descriptions are not, however, advisable, and should, whenever possible, be avoided, as they have a certain element of uncertainty about them which, under some circumstances it may be impossible to remove. Thus, for example, the description of premises as having been occupied by a certain person located in a certain town or village may be ambiguous when it is ascertained that the person named occupied or occupies two separate dwellings in the same town. So, where premises are described as the farm or building which "was conveyed to the lessor by A" and located in a certain town and there are several premises conveyed by A there is a latent ambiguity which renders the description very doubtful. Where a lease is made of a farm "now in the possession of A," no more will pass than that portion of the farm which A was in actual possession of when the lease was made and if any part of the farm was reserved in A's lease, it will not pass to the new lessee though it is not reserved in the lease made to him though such reservation was not actually intended by the parties.⁵⁰

§ 238. **The description of the parties.** The rule of the law of contracts that the parties to the contract must be certain or ascertainable is applicable to written leases. The general rules of law relating to the parties to a written contract require that they should be either expressly named or indicated in such a way that their identity can be ascertained. Hence, if the parties to a written contract do not appear designated in the instrument itself, and if there is nothing in the transaction which shows who they are, the writing is void.⁵¹ Hence, good practice requires the names of the parties to the lease to be stated correctly and filled in the body of the instrument, but a mistake in the

⁵⁰ *Bartlett v. Wright*, Cro. Eliz. 299.

Mayo v. Chenewoth, 1 Ill. (Breese) 200; *Brown v. Gilman*, 13 Mass

⁵¹ *Webster v. Ela*, 5 N. H. 540;

158; *Ball v. Allen*, 15 Mass. 433.

name, whether of the lessor or of the lessee does not invalidate the lease if the parties can be ascertained either from the other elements of the description or from parol evidence.⁵² So, a mistake in the name of a party, whether of an individual or a corporation, will not invalidate the lease.⁵³ And even omitting the name of the lessor from the granting clause of the lease may be disregarded if it can be ascertained who he is.⁵⁴ A misdescription of the lessee or lessor in a lease where neither party is misled thereby does not render the instrument invalid. Thus the word "incorporated" inserted after the names of the lessors who were in fact partners in business, does not in any manner affect the binding character of the lease, where the lessors in signing the lease signed as partners and not as a corporation. Under such circumstances, the lessee would be absolutely protected in paying the rent to the lessors as though they were a firm and in taking receipts from them in that capacity.⁵⁵ A contract which firm would be valid though only one person constituted the would include a lease, obtained in good faith in the name of the firm.⁵⁶ The omission from the lease of the individual names of the members of the two firms who are named in the lease as lessor and lessee is not material nor are they released from their individual liability as the partners may by a subsequent ratification make the lease binding on them to the same extent as though their names were written in it.⁵⁷ Hence, it follows that a party whose name was intended to be in the instrument but which was omitted from it may, by his subsequent conduct in accepting benefits of it, become liable as a party to it. But on the other hand, a person whose name is not in the body of the lease as a party is not personally liable thereon though he signed the lease and acknowledged it.⁵⁸ Again where a lease was

⁵² *Lyon v. Kain*, 36 Ill. 362; *Montanye v. Wallahan*, 84 Ill. 355; *Medway Cotton Co. v. Adams*, 10 Mass. 360; *Dodd v. Bartholomew*, 44 Ohio St. 171, 5 N. E. Rep. 866; *In re Pelican Co.*, 47 La. Ann. 935, 17 So. Rep. 427; *Games v. Stiles*, 14 Pet. (U. S.) 322.

⁵³ *McCarthy v. Noble*, 5 N. Y. 380; *Hacket v. Marmet Co.*, 8 U. S. App. 150, 52 Fed. Rep. 268, 273, 3 C. C. A. 76.

⁵⁴ *Schulte v. Schering*, 2 Wash. St. 127, 26 Pac. Rep. 78.

⁵⁵ *Julicher v. Connelly*, 102 N. Y. Supp. 620.

⁵⁶ *In re Pelican Ins. Co.*, 47 La. Ann. 935, 17 So. Rep. 427.

⁵⁷ *Golding v. Brennan*, 183 Mass. 286, 67 N. E. Rep. 239.

⁵⁸ *Barnsdall v. Boley*, 119 Fed. Rep. 191, 195.

signed by a person whose name was not on the lease at all nor even in the attestation clause, he was held not to be liable for the rent as a lessee though if he had accepted the benefits conferred by the lease he would unquestionably be precluded from denying his liability by showing that his name was signed to the lease.⁵⁹ Inasmuch as the law recognizes only one christian name, the insertion or omission of a middle name of a party is immaterial.⁶⁰ Finally, it may be said that if there is nothing in the language of the lease or provable from the circumstances of the case which will indicate who is mentioned by the imperfectly expressed name, the lease may be declared void for uncertainty.⁶¹

§ 239. **The date of the lease.** At a common law, that is to say, in the absence of any statute requiring a written contract to be dated, an instrument in writing including a deed was valid though the date of its execution was omitted from it.⁶² So, also, the omission of a date from the acknowledgment which is at-

⁵⁹ *Evans v. Conklin*, 24 N. Y. Supp. 1081, 71 Hun, 536, 54 N. Y. St. Rep. 915. For the general rule of the law of contracts under which the signing of a contract by one not named therein it renders him liable. *Kendall v. Kendall*, 7 Me. 171; *Staples v. Wheeler*, 38 Me. 372; *Clarke v. Rawson*, 2 Denio (N. Y.) 135; *Thompson v. Goble*, 16 Pac. Rep. 713. *Contra*, *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. Rep. 27; *Evans v. Conklin*, 71 Hun, 536, 24 N. Y. Supp. 1081, 54 N. Y. St. Rep. 915.

⁶⁰ *Games v. Stiles*, 14 Pet. (U. S.) 322; *Lyons v. Kain*, 36 Ill. 362.

⁶¹ *Webster v. Ela*, 5 N. H. 540; *Marshall v. White's Creek Turnpike Co.*, 7 Cold. (Tenn.) 252. In *Barnsdall v. Boley*, 119 Fed. Rep. 191, it was held that a lease signed by the lessor but which did contain his name in the body of it was void and created no term for

no one can be bound by a lease who is not a party to it and no one can be a party to a lease who is not mentioned and referred therein, citing *Adams v. Medsker*, 25 W. Va. 127; *Bell v. Allen's Adm'r*, 3 Munf. (Va.) 118.

⁶² *Seldonridge v. Connoble*, 32 Ind. 375; *Pierce v. Richardson*, 37 N. H. 306; *Dean v. De Lezardi*, 24 Miss. 424; *Fash v. Blake*, 44 Ill. 302 (lease); *Thompson v. Thompson*, 9 Ind. 323; *Lee v. Massachusetts Ins. Co.*, 6 Mass. 208; *Banning v. Eades*, 6 Minn. 402; *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230, 234 (lease); *Genter v. Morrison*, 31 Barb. (N. Y.) 155; *Giles v. Bourne*, 6 M. & S. 73; *Soloman v. Evans*, 3 McCord (S. C.) 274; *Simmons v. Trumbo*, 9 W. Va. 358; *Fournier v. Cyr*, 64 Me. 32; *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co.*, 63 Fed. Rep. 48, 11 C. C. A. 96, 22 U. S. App. 439.

tached to a lease may be disregarded and will not invalidate the writing nor authorize a recording officer to refuse to place it on record providing the date can be supplied by parol evidence.⁶³ A lease which has no date in it and which also fails to state when the lessee goes into possession or which bears a date on which it is impossible that it should have been executed, as for example, where it is dated the 30th day of February, will operate from its delivery.^{63a} All written instruments will be presumed to have been executed and written upon the day of the date which appears in them, though this presumption may be rebutted by showing that that date is an error.^{63b} Parol evidence is also receivable to show that a date inserted in a lease or other writing is erroneous.^{63c}

§ 240. **The date of the commencement of the term.** It is always advisable to specify explicitly in the lease the date upon which the term is to begin. If no term is mentioned in the lease and is not ascertainable by construing, the lease will be held void for uncertainty.⁶⁴ If, from the lease or by construction, it

⁶³ Rackleff v. Norton, 19 Me. 274; Wickes v. Caulk, 5 H. & H. (Md.) 36; Huxley v. Harrold, 62 Mo. 516; Lea v. Polk, etc., Co., 21 How. (U. S.) 493.

^{63a} 4 Coke Litt. 46 B; Keys v. Dearborn, 12 N. H. 52; Trustees, etc., v. Robinson, Wright (Ohio) 436; Jackson v. Schoonmaker, 2 Johns, (N. Y.) 231; Church v. Gilman, 15 Wend. (N. Y.) 656.

^{63b} Overton v. Matthews, 35 Ark. 147, 37 Am. Rep. 9; English v. Breneman, 5 Ark. 377, 41 Am. Dec. 96; Le May v. Williams, 32 Ark. 166; Billing v. Stark, 15 Fla. 297; Hamilton v. Wood, 70 Ind. 306; Bank of Commonwealth v. McChord, 4 Dana (Ky.) 191; Lisle v. Rogers, 18 B. Mon. (Ky.) 528; Cutts v. York, etc., Co., 18 Me. 190; Harrison v. Phillips Academy, 12 Mass. 456; Smith v. Porter, 10 Gray (Mass.) 66; Gardener v. Webber, 17 Pick. (Mass.) 407;

Aubuchon v. McKnight, 1 Mo. 312, 13 Am. Dec. 502; Britton v. Dierker, 46 Mo. 591; Crawford v. West Side Bank, 100 N. Y. 50; Meadows v. Cozart, 76 N. C. 450; Brown v. Straw, 6 Neb. 536; Stephen v. Graham, 7 S. & R. (Pa.) 505, 10 Dec. Am. 485; Heffner v. Wenrich, 32 Pa. St. 432; Wood v. Steele, 6 Wall. (U. S.) 80; Outhwaite v. Luntley, 4 Camp. 179; Walton v. Hastings, 4 Camp. 223, 1 Starke R. 215; Cardwell v. Martin, 9 East, 180; Master v. Miller, 4 T. R. 320, 2 N. Bl. 140; Vance v. Lowther, 45 L. J. Ex. 200, L. R. 1 Ex. D. 176; Sinclair v. Bagglely, 4 M. & W. 312.

^{63c} Nall v. Cazenove, 4 East. 477. See Stele v. Martin, 4 B. & C. 273; Cooper v. Robinson, 10 M. & W. 694; Jaynes v. Hughes, 10 Ex. 430; Rex v. Flintshire, 3 Dowl. & L. 537; Reffel v. Reffel, 1 L. R. P. & D. 139.

⁶⁴ Kirsley v. Duck, 2 Vern. 684.

cannot be ascertained when the term begins the lease will be void. For in order that a written instrument shall be valid as a lease it must be for a term which is certain or which can be ascertained. Hence, a writing which conveys the right to mine until all mineral shall be exhausted is not a lease because it is impossible to ascertain when the mineral shall be exhausted.⁶⁵ The date upon which the term is to begin may be shown by any parol evidence which is not inconsistent with the terms of the lease. An instrument is not invalid as a lease because the term is not specified in definite language if the beginning or duration of the term can be ascertained by parol evidence.⁶⁶ Thus, for example, where there is a manifest clerical error in the language of the lease by which the length of the term is made to appear ambiguous, a counterpart of the lease may be looked at by the court to ascertain where the mistake is, and the counterpart will be controlling providing it is clear and free from ambiguity.⁶⁷ The difficulty is usually not so much in ascertaining the length of the term but is ascertaining the date upon which the term begins. If the date upon which the term is to begin can be ascertained from the lease or from parol evidence, it is clear that the length and the date of the expiration of the term can usually be very easily ascertained with all the elements of vagueness and uncertainty removed. In the first place, it is a rule that where the parties in the lease have not specified the date upon which the term is to begin with the date on which the lessee entered into possession, will be the first day of the term.⁶⁸ Thus, in the case of a valid lease for a term commencing in the future where the date of the beginning of the future term is not mentioned, the necessary element of certainty in the commencement of the future term is met by the tenant going into possession and paying rent under the lease. And the tenant cannot thereafter assert that his term was uncertain.⁶⁹ So, where a tenant moved in and paid five months' rent in advance and which the landlord received under an oral agreement for a

⁶⁵ *Hobart v. Murray*, 54 Mo. App. 249.

⁶⁶ *Lovelock v. Franklyn*, 8 Q. B. 371, 16 L. J. Q. B. 182, 11 Jur. 1035.

⁶⁷ *Burchell v. Clark*, 46 L. J. C.

P. 115, 2 C. P. D. 88, 35 L. T. 690, 25 W. R. 334.

⁶⁸ *Eberlien v. Abel*, 10 Ill. App. 626.

⁶⁹ *Hammond v. Barton*, 93 Wis. 183, 67 S. W. Rep. 412.

lease for a term of years, but which fixed no date for the commencement of the term of years, it was held that the term began when the tenant moved in.⁷⁰ So, the day possession was given is the date from which the lease was to commence, under an agreement for a lease of a public house which provided for a term of three years with an option to renew for another seven years and for possession to be given "within one month from this date."⁷¹ The circumstance that a lessee took possession of the premises on the day from which the computation of the term is made, is a very strong indication that the term was to begin on that day and was to expire the midnight of the day preceding that date in some subsequent year when the lease is for term of years.⁷² In determining when an oral lease is to commence, the jury may take into consideration the time when the lessee went into possession, the time from which he paid rent, and all other circumstances in connection with the lease which throw any light upon the question of when the term is to commence.⁷³ Thus, if the rent is to be paid in advance on the first

⁷⁰ *Fegreisen v. Sanchez*, 90 Ill. App. 105.

⁷¹ *In re Lander's Contract* (1892), 3 Ch. 41.

⁷² *Buchanan v. Whitman*, 151 N. Y. 253, 45 N. E. Rep. 556, 557, 3 Ann. Cases, 349, affirming 76 Hun, 67, 59 N. Y. St. Rep. 619, 27 N. Y. Supp. 604.

⁷³ *Pendill v. Neuberger*, 67 Mich. 562, 35 N. W. Rep. 249. See, also, *Meeks v. Ring*, 4 N. Y. Supp. 117, 119, 51 Hun, 329. The parties may agree among themselves what meaning to give a lease or a term which begins from the date of the lease. Where the term extends to one "year from the date thereof," the fact that the parties took possession on that date is a construction of the lease, and is conclusive that they intended that it should begin on that date and conclude at midnight on the preceeding day of the next year. *Buchanon v.*

Whitman, 151 N. Y. 253, 256, 3 Ann. Cases, 349, 45 N. E. Rep. 556, affirming 76 Hun, 67, 27 N. Y. Supp. 604, 59 N. Y. St. Rep. 619. The term of a tenant under an agreement that he shall quit at three months' notice, commences on the date when he enters, in the absence of any provision expressly fixing the day upon which the term commences. So, where he enters under such an agreement at the middle of one of the usual quarters his term begins from that day and his tenancy can, under such circumstances be terminated by the landlord giving a notice to quit which expires on that day of the year, or some other quarter day computed from that date. The court, in laying down these rules, applied it generally to all parol leases, under which it said that no interest exists until the tenant went into possession, particularly

day of the term or of each month or quarter it will be readily presumed that in the case of a lease to begin on the first day of a month stated the first day is included in the term.⁷⁴ But it has also been held that where the lease itself fixes no day upon which the term is to begin, that it begins at the date of the instrument,⁷⁵ or from its delivery.^{75a} In a case of a tenancy from month to month where a tenant who goes into possession during the month pays rent to the first day of the following month, his tenancy will be deemed to commence with the day to which he has paid.⁷⁶ It may sometimes be necessary in determining the commencement of the term to draw a line of distinction between the time when the enjoyment and occupation of the premises is to begin and the time from which the instrument itself is to run. The two are not always synonymous. Thus, the possession may be expressly agreed upon to begin on a day in the future though running in computation of time from a present or past day. Thus, a lease may be given to have and to hold from the first day of January next for the term of ten years, the term to begin from the date of the lease or from a prior date thereto.⁷⁷ In the case of a lease dated on one day, *habendum* from a day preceding, the term begins from the date

where the lease is invalid under the statutes of frauds. If a parol lease is valid the landlord's only remedy upon it is where the tenant has not entered an action upon the agreement to pay rent. If the tenant neglected to pay rent before entering the landlord may put an end to the lease by taking possession of the premises, or he may, at his election, let them lay idle and vacant and sue for the rent. *Kemp v. Derritt*, 3 Camp. 510.

⁷⁴ *Meeks v. Ring*, 4 N. Y. Supp. 117, 119, 51 Hun, 329.

⁷⁵ *Keyes v. Dearborn*, 12 N. H. 52; *Enys v. Donnithorne*, 2 Burr. 1197; *Rowe v. Huntington*, 1 Vaughan, 73.

^{75a} *Jackson v. Schoonmaker*, 2

Johns. (N. Y.) 231. A lease for a term of years "next ensuing the day written," commences on the day and date of the lease, and a notice of the election of the tenant to terminate the lease given on the same day of the month, a year later, is too late, as the second year has begun for the rent of which the tenant may be held. *Nesbit v. Godfrey*, 155 Pa. St. 251, 25 Atl. Rep. 621, following *Lysle v. Williams*, 15 S. & R. (Pa.) 136; *Marys v. Anderson*, 24 Pa. St. 272.

⁷⁶ *Ver Steeg v. Becker-More Paint Co.*, 106 Mo. App. 257, 80 S. W. Rep. 346, 351; *Doe v. Johnson*, 6 Esp. 10.

⁷⁷ 3 Bac. Abr. 425; Rol. Abr. 250; *Engs v. Donnithorne*, 2 Burr. 1190.

though the lessee had a right to an earlier possession.⁷⁸ A lease for a term of years of a building in process of construction and which the lease recites is to be completed on a day therein specified, does not necessarily mean that the term is to begin upon the day on or by which the building is to be completed and that if the building is not completed, the lease shall not bind the lessee. The recital of the date upon which the building was to be completed may be presumed to be mere matter of description pointing out what property is to be leased leaving the commencement of the term to be determined by the jury from all the facts and circumstances of the case. And where in the lease itself or in some other instrument, the lease is spoken of as commencing on the completion of the building and running for a specified period thereafter, the term will commence upon the completion of the demised premises and not upon any date specified by the parties when that event shall take place.⁷⁹ In determining the exact day or date upon which a term begins and ends, the courts, in modern times at least, are not guided or do not recognize any express rule or presumption of law, or any particular or technical meaning of the word "day" or "date," but are guided rather by the language of the lease which is assumed to express all the intention of the parties; and by the facts and circumstances of each case.⁸⁰ In the absence of any particular expression of an intention to the contrary, if a lease for years, or from year to year, bearing a certain date, is to run, or "to have and hold" from that date, the term usually begins on the day following that date, and the day of the date

⁷⁸ *Mayn v. Beak*, Cro. Eliz. 515. This is a subject on which a great diversity of opinion is prevalent. Lord Mansfield in *Pugh v. Duke of Leeds*, Cowper, 714, says that "from the date" meant either including or excluding the day according to the context and subject matter. In other words the computation of time should always conform to the manifest intention of the parties. Thus, where a term was granted for five years from the first day of April, 1853,

the day of the date of the lease was included in computing the time and the court took into consideration in thus construing the lease that rent was made payable on the first days of April, July, October and January, in each year. *Deyo v. Bleakley*, 24 Barb. (N. Y.) 9.

⁷⁹ *Noyes v. Loughhead*, 9 Wash. 325, 329, 37 Pac. Rep. 452, 453.

⁸⁰ *Pugh v. Duke of Leeds*, Cowper, 714; *Ackland v. Lutley*, 9 Ad. & E. 879.

is excluded in computing the duration of the term.⁸² On the other hand, where the intention of the parties clearly called for such a construction, it has been held that a lease to run from a particular day specified included that date.⁸³ An agreement for a future lease in a building which was not completed, for a term of five years from the completion of the building, is definite, and the term begins when the building is complete. There need be no covenant in the lease that the lessor shall complete the building, for the completion of the building is a condition precedent to the commencement of the term. The fact that the lessee goes into possession and pays rent indicates that the parties have agreed that the building is complete and there is no objection to the lease on the ground of mutuality.⁸⁴

§ 241. **The necessity of the delivery of the lease.** Inasmuch as a deed takes effect only from its delivery by the maker to the grantee, or to some person authorized by the grantee to receive the deed where a lease is made by writing under seal, it is necessary to its validity as a lease, that it shall be delivered either to the lessee or to his authorized agent. The general rules of law which involve the delivery of deeds are applicable to a written lease under seal and will be found cited in the notes.⁸⁵

⁸² Goode v. Webb, 52 Ala. 452; McGlynn v. Moore, 25 Cal. 384; Kendall v. Kingsley, 120 Mass. 94; Atkins v. Sleeper, 7 Allen (Mass.) 487; Thornton v. Payne, 5 Johns. (N. Y.) 74; Wilcox v. Wood, 9 Wend. (N. Y.) 346; Marys v. Anderson, 24 Pa. St. 272, 276, 2 Grant Cases, 446; Lysle v. Williams, 15 S. & R. (Pa.) 135; Nesbit v. Godfrey, 155 Pa. St. 251, 25 Atl. Rep. 621; Wilkinson v. Gaston, 9 Q. B. 137; Pellew v. Wonford, 9 Barn. & Cress. 134; Webb v. Fairmaner, 3 Mee. & Wel. 473; 4 Coke, 46b.

⁸³ Fox v. Nathans, 32 Conn. 348; Deyo v. Bleakley, 24 Barb. (N. Y.) 9; Trull v. Granger, 8 N. Y. 115. It was held in Buchanan v. Whitman, 27 N. Y. Supp. 604, 76 Hun, 67, where a lease dated April 8th, to run one year from the date

hereof, was held to expire on April 7th of the next year. A lease which is to operate from the making thereof, or from henceforth will *prima facie* be presumed to operate from the date of its delivery. 4 Coke Lit. 46b. Where a lease was dated March 25, 1783, and habendum "from the 13th of March now last past," and the deed was not executed until sometime after the date, the term commenced on the 25th of March, 1783, and not on the 25th of March, 1782. Stule v. Mart, 6 D. & R. 392, 4 B. & C. 272, 28 R. R. 256.

⁸⁴ Hammond v. Barton, 93 Wis. 183, 67 N. W. 412.

⁸⁵ Frisbie v. McCarty, 1 Stew. & P. 56; Stetson v. Briggs, 114 Cal. 511, 515; Oneto v. Restano, 89 Cal.

Thus where a lease was signed by lessees but never delivered by them, but they assigned it at the request of the lessor and delivered it to the agent of the lessor and the lessor then collected the first instalment of rent from the assignee, it was held that there was no delivery of the lease to the lessor. An actual manual delivery of the lease by the lessor to the lessee is not essential and may be dispensed with, if, from the circumstances, it may be fairly inferred that a delivery of the lease was intended by the parties.^{85a} Of course, if the lessor actually retains the lease in his possession though it has been signed by the lessee, there can be no delivery to the lessee. For it is absolutely necessary to a valid delivery that the lessor should part with the control of the written lease. The delivery of a lease is complete as soon as the lessor has done something with the lease which prevents his regaining possession and control of it. Thus, where a lease was signed by both parties and was left with an attorney to have a copy made of it, its delivery to the lessee was presumed.⁸⁶ A lease under seal or other sealed instruments will be presumed to have been delivered upon the day of its

63, 26 Pac. Rep. 788; Rittmaster v. Brisbane, 19 Colo. 371, 35 Pac. Rep. 736, 740; Speed v. Brooks, 30 Ky. 119; Ford v. Gregory's Heirs, 49 Ky. 175; Maddox v. Gray, 75 Ga. 452; Dearmond v. Dearmond, 10 Ind. 191; Pike v. Leiter, 26 Ill. App. 530; Leiter v. Pike, 127 Ill. 287, 20 N. E. Rep. 23; Dickerson v. Merriman, 100 Ill. 342; Robinson v. Robinson, 116 Ill. 250, 5 N. E. Rep. 118; Howard v. Carpenter, 11 Md. 259-277; Rhome v. Gale, 12 Minn. 54; Jackson v. Sheldon, 22 Me. 569; Egery v. Woodard, 56 Me. 45; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Fay v. Richardson, 24 Mass. 91; Thatcher v. St. Andrew's Church, 37 Mich. 263; Robinson v. Noel, 49 Miss. 253; Jelks v. Barrett, 52 Miss. 315; Crawford v. Bertholf, 1 N. J. Eq. 458; Black v. Shreve, 13 N. J. Eq. 455; Church v. Gilman, 15 Wend. (N. Y.) 656, 30 Am. Dec.

82; Fogal v. Pirro, 23 N. Y. Super. Ct. 100; Morrow v. Williams, 14 N. C. 264; Green's Trustees v. Robinson (Wright), Ohio, 436; Kelsey v. Tourtelotte, 59 Pa. St. 184; Hammell v. Hammell, 19 Ohio, 17; Arthurs v. Bascon, 28 Leg. Int. (Pa.) 284; Coln v. Coln, 24 S. C. 596; Alexander v. Bland, 3 Tenn. 431; Stiles v. Brown, 16 Vt. 564; Dwinell v. Bliss, 58 Vt. 363, 5 Atl. Rep. 317.

^{85a} McClure v. Colelough, 17 Ala. 89; Rivard v. Walker, 39 Ill. 413; Walker v. Walker, 42 Ill. 311, 89 Am. Dec. 445; Mallett v. Page, 8 Ind. 364; Crawford v. Bertholf, 1 N. J. Eq. 458; Goodrich v. Walker, 1 Johns. Cas. (N. Y.) 250; Lore's Heirs v. Truman, 1 Ohio Dec. 510, 10 West. Law J. 250; Farror v. Bridges, 24 Tenn. 411.

⁸⁶ Reynolds v. Greenbaum, 80 Ill. 416.

date, notwithstanding that the date of the acknowledgment to the instrument is subsequent to the date in the body of the writing.⁸⁷ There are cases which sustain a contrary rule, the substance of which is that where there is a discrepancy between the date of the instrument and the date in the acknowledgment, delivery will be presumed to have taken place upon the date of the acknowledgement.⁸⁸ So, the presumption that a lease or instrument under seal was delivered upon the day of its date is never conclusive, and the fact that it was delivered upon some other day may always be proved by parol evidence.⁸⁹ The general rules defining what shall constitute the delivery of a deed are ordinarily applicable to leases under seal. A distinction, however, should be noted. A deed conveying the fee is ordinarily valuable solely to the grantee and its maker has no further interest in retaining it after he has received the purchase money. A lease is very different, for under it the lessor has frequently as much interest as the lessee and consequently he may be justified to a certain extent in retaining it in his possession. Leases are usually executed in duplicate, each party keeping a copy. But when this is not done, the retention of the lease by either party, with the consent of the other, does not necessarily indicate that the lease has not been delivered. If both parties know that a lease has been executed and that it is in operation, its retention by the lessor is immaterial on the question of delivery. The entry of the lessee and the payment and receipt of rent then raise a conclusive presumption of de-

⁸⁷ Jayne v. Gregg, 42 Ill. 413; Robinson v. Gould, 26 Iowa, 89; Ford v. Gregory, 10 B. Mon. (Ky.) 75; Sweetser v. Lowell, 33 Me. 446.

⁸⁸ Blanchard v. Taylor, 12 Mich. 339; Loomis v. Pingree, 43 Maine, 299; Fountain v. Boatmen's Savings Institution, 57 Mo. 553.

⁸⁹ Treadwell v. Reynolds, 47 Cal. 171; Barry v. Hoffman, 6 Md. 78; Fairbanks v. Metcalf, 8 Mass. 230; Harrison v. Phillips' Academy, 12 Mass. 426; 2 Bl. Com. 307; Goodrich v. Walker, 1 John. Cas. (N. Y.) 250; Green's Trustees v. Rob-

inson, Wright (Ohio), 436. This presumption is not recognized in New York in respect to all deeds not acknowledged or witnessed; and *a fortiori* is rebuttable by showing that the deed or lease was in the possession of its maker or the lessor subsequent to its date. Elsey v. Metcalf, 1 Denio, 323; or by the fact that the date of the acknowledgment is subsequent to the date of the instrument. McIntyre v. Strong, 48 N. Y. 127.

livery to the lessee.⁹⁰ On the other hand, the placing of a lease in the hands of the lessee is not alone a sufficient delivery if such was not the intention of the parties. This would be the case where a lessee was handed a lease for the purpose of having a guarantee of the rent endorsed thereon.⁹¹ A question whether a lease has been executed and delivered to a lessee where there is a conflict in the evidence has to be determined by the jury.⁹²

§ 242. **The acceptance of a lease.** The delivery of a lease by the lessor to the lessee, whether express or implied, may be disregarded if there is no acceptance by the lessee. In the case of deeds, generally the law will imply an acceptance by the grantee upon the ground that the deed is beneficial to the grantee.⁹³ Thus, it has been held that in the case of deeds, the actual knowledge by the grantee of the conveyance is not essential because his assent to the delivery will be presumed upon the beneficial character of the conveyance, and this presumption can be overcome by proof of dissent, since, if this be not the case, there

⁹⁰ *Oneto v. Restano*, 89 Cal. 63, 26 Pac. Rep. 788.

⁹¹ *Jordan v. Davis*, 108 Ill. 336. So the delivery of a lease may be in escrow as where, after its execution, it is left in the hands of a third person to be given to the lessee as soon as he shall pay the rent for the first month of the term. *Witthaus v. Starin*, 12 Daly (N. Y.) 226. See, also, as to delivery of a lease, *Hayes v. Lawver*, 83 Ill. 182; *Garsuch v. Rutledge*, 79 Md. 272, 17 Atl. Rep. 76.

⁹² *Miltown v. Goodman*, Ir. R. 10 C. L. 27; *Hastings v. Vaughn*, 5 Cal. 315; *Bensley v. Atwill*, 12 Cal. 231; *Brann v. Monroe*, 11 Ky. Law Rep. 324; *Hurlburt v. Wheeler*, 40 N. H. 73; *Crain v. Wright*, 36 Hun, 74, 114 N. Y. 307, 21 N. E. Rep. 401; *Fisher v. Keane*, 1 Watts (Pa.) 278; *Stoney v. Winterhalter*, 11 Atl. Rep. (Pa.) 611; *Shaw v. Cunningham*, 16 S. C. 631; *Lindsay v. Lindsay*, 11 Vt.

621; *Dwinell v. Bliss*, 58 Vt. 353, 5 Atl. Rep. 317. The question of delivery, being one of the intentions of the parties to be inferred from all the circumstances, is usually a question of fact and not of law. So the question whether a deed or a lease was executed and delivered at the date in the lease is a question of fact for the jury. *Genter v. Morrison*, 31 Barb. 155.

⁹³ *Treadwell v. Reynolds*, 47 Cal. 171; *Billings v. Starke*, 15 Fla. 297; *Fash v. Blake*, 44 Ill. 302; *Scobey v. Walker*, 114 Ind. 254, 15 N. E. Rep. 674; *Faulkner v. Adams*, 126 Ind. 459, 26 N. E. Rep. 170; *Alexander v. De Kernel*, 81 Ky. 345; *Sweetser v. Lowell*, 33 Me. 446; *Smith v. Porter*, 76 Mass. 66; *Saunders v. Blythe*, 112 Mo. 1, 20 S. E. Rep. 319; *Robinson v. Wheeler*, 25 N.Y. 252; *Hall v. Benner*, 1 Pen. & W. (Pa.) 403, 21 Am. Dec. 394; *Raines v. Walker*, 77 Va. 92.

can be no delivery in law of a deed to an infant.⁹⁴ In the case of leases, under some circumstances, the same presumption or implication of an acceptance by the lessee where the lease is executed by both parties and delivered to him will be recognized. The beneficial character of a lease so far as the tenant is concerned, is not so apparent as furnishing a basis for the presumption of its acceptance by him as it would be in the case of a deed of the fee simple. The conveyance of the fee of real estate by a deed may be based upon a good consideration, as for example, the love and affection which the grantor has for the grantee. This is so in many instances. On the other hand, leases are contractual in their nature and as contracts are merely promises to perform on the part of both parties. But, unquestionably, there is some presumption of the acceptance of the lease on the part of a lessee.⁹⁵ For unquestionably, the delivery of a lease may be of benefit to the lessee. The beneficial character of a lease so far as the lessee is concerned is not always to be determined by the term which it purports to create. The nature and circumstances of the parties and the title of the lessee must be considered; and, where at the date of the execution of the lease, the lessor had no title to the premises, while the lessee had a claim of title based on several years of uninterrupted possession, no presumption of benefit to the lessee will arise.⁹⁶ A lessee who accepts a lease executed by and delivered to him by his landlord without the lessor's consent cannot qualify his acceptance and modify the terms of the writing by parol; he must either accept the lease or reject it absolutely and cannot accept it on condition. Hence, where a lessor, in fulfilling his covenant to renew a lease, executed and sealed a lease which he then sent to the lessee, the signing of the lease by the lessee and the return of a duplicate to the lessor are not a rejection of the lease by reason of the fact that the lessee sends to the lessor a letter denying the lease bound him to pay the rent named in it.⁹⁷ But an acceptance may be given on condition that the

⁹⁴ *Mitchell v. Ryan*, 3 Ohio St. 377; *Falk v. Varn*, 9 Rich. Eq. (S. C.) 303; *Wall v. Wall*, 30 Miss. 91; *Robinson v. Gould*, 26 Iowa, 89, 93.

⁹⁵ *Maynard v. Maynard*, 10 Mass. 456; *Hedge v. Drew*, 12 Pick. (Mass.) 141; *Hatch v.*

Hatch, 9 Mass. 307; *Jackson v. Dunlap*, 1 Johns. Cases (N. Y.) 114; *Jackson v. Bodle*, 20 Johns. (N. Y.) 184.

⁹⁶ *Camp v. Camp*, 5 Conn. 291, 200, 13 Am. Dec. 60.

⁹⁷ *Leiter v. Pike*, 127 Ill. 287, 29

lease shall be valid if the parties shall consent thereto.⁹⁸ The retention of a lease by the lessee which has been executed by a lessor and sent to a lessee, may, as we have seen, raise a presumption that the lessee has accepted it. The payment of rent may also raise an implication of the acceptance of a lease by a lessee. Where a lessee executed leases, tendered him by the lessor in duplicate on a parol agreement by the latter to repair the premises, and, at the same time, pays a sum of money down, it was held that the payment down was not an acceptance of the lease by the lessee where the owner retained both copies.⁹⁹ The question of the acceptance of the tenant's offer by the landlord may be material. The landlord's acceptance of the tenant's offer must be clear and unequivocal. The acceptance of the landlord, like that of the tenant must also be unconditional. The sending of a draft lease by the lessor to a lessee who had signed a memorandum agreement which was in its character an offer to take a lease accompanied by his references, where the lessor does not accept the offer either in writing or by parol, is not such an unconditional acceptance of the proposed lease as will enable the lessee to obtain specific performance for the reason that the acceptance of a written proposal must be an unambiguous act. This cannot be said of the sending of a draft lease which might have been sent to save time and without any intention on the part of the lessor of accepting the proposal. So, also, an acceptance of a proposal for a lease must be unconditional. The sending of a draft lease, if it is an acceptance at all, is an acceptance upon the condition that the lessee is satisfied with it.¹ So, a memorandum of an agreement for a lease, which is signed by the intended lessee, and which contains his references, but which is not signed by the lessor, and which does not contain in any portion of it, the name of the lessor, is not binding on the

N. E. Rep. 23, 33, affirming *Pike v. Leiter*, 26 Ill. App. 520.

⁹⁸ *Shelton v. Durham*, 76 Mo. 434, 437, where it appears that the lessee, after the execution of the lease, having learned of certain defects in its execution which invalidated it, refused to receive it and the lessor agrees to remedy the defects if he would accept it

which he did. It was held that the acceptance was conditional on a correction of the defects.

⁹⁹ *Flommerfeldt v. Englander*, 61 N. Y. Supp. 187, 29 Misc. Rep. 655; *Witthaus v. Starin*, 12 Daly (N. Y.) 226.

¹ *Warner v. Willington*, 3 Drew, 523, 25 L. J. Ch. 662, 2 Jur. (N. S.) 433, 4 W. R. 53

lessee as an agreement to make a lease,² unless the name of the intended lessor can be ascertained from some other writing which is sufficiently connected with the memorandum by clear reference to cure the omission from the memorandum. So, if the memorandum of lease refers to the conditions named in another paper or refers to a writing containing the name of the lessor or the lessee writes a letter containing the name of the lessor, the defect will be cured. The presumption that arises from the record of an instrument that it has been delivered, may be rebutted by proof of a contrary intention. Thus, where the assignment of a lease was recorded after the death of the lessor, and it was shown the writing had never been in the hands of the lessee, but that a notary had under the lessor's instructions, retained it in his possession for the lessor until he died, when he recorded it; it was held that there had been no delivery³ by the lessor. And it was also held in the same case that payment of rent by the assignee while he was in possession of the demised premises and his rental, that the lease had been assigned to him, would not estop him to assert that there had been no delivery to him.

§ 243. **The necessity for the entry of the tenant.** By the common law, livery of seizin or the actual entry of a grantee upon the land was necessary to the validity of every grant of land for life or of an estate of inheritance. This was not necessary in the case of grants of terms of years. In England and in most of the states of the Union, the distinction has been abolished and the estate vests in the grantee upon the delivery of the deed or lease whether it is an estate for life, in fee, or for years.⁴ In the case of a lease, all that is vested in the lessee down to the date he goes into possession is the right of possession. This vests in the lessee before the delivery to him of the lease. And at common law it was said that the lessee under a lease had only the *interesse termini* until he entered into possession, and it followed therefore, that he could not, until he had entered into possession, maintain trespass against an intruder.⁵ The execu-

² *Champion v. Plummer*, 1 N. R. 252.

³ *Canale v. Copello*, 137 Cal. 22, 69 Pac. Rep. 698.

⁴ *Flint v. Sheldon*, 13 Mass. 443;

Higher v. Rice, 5 Mass. 344; *Matthews v. Ward*, 10 G. & J. (Md.)

443; *Bryan v. Bradley*, 116 Conn. 474.

⁵ *Co. Litt.* 296b; *Harrison v.*

tion and delivery of a lease give the tenant the right to the possession and a right of action against the landlord for damages, if the landlord fails to deliver possession, but they do not give the tenant any right to maintain an action against a third party either to recover damages for trespass or to oust a third party who has taken possession of the premises. The tenant who has signed the lease may be released by the landlord from his covenant to pay rent before he has entered into possession, and the lessee on the other hand before he has entered may assign his lease, and his assignee will take under it, not the possession, but the right to the possession. The death of the lessor before the entry of the lessee does not determine the latter's right to enter under the lease. The lessee may enforce his right of entry and recover damages for its denial from the heirs of the lessor. So, also, when the lessee dies before entry, his heirs or personal representative may enter. So, also, if the lease is made to two jointly, either may enter on the death of the other.⁶

§ 244. **The date upon which the lease expires.** The date upon which the term created by the lease expires is to be determined by computing the time from the date upon which the term commences. Whether or not the date upon which the term commences is or is not to be included in this computation is elsewhere considered. Generally it is unnecessary to mention the date upon which the lease terminates. If the date of the

Blackburn, 17 C. B. (N. S.) 678; *Wheeler v. Montefiore*, 2 Q. B. 133; Co. Litt. 296b; Comyn's Digest, Trespass B.

⁶ It is firmly settled that a lessee or the assignee of a lease or a mortgagee before entry cannot maintain trespass since that action is always based on actual possession. *Harrison v. Blackburn*, 17 Com. Bench (N. S.) 678, 692. See, also, on the necessity for an actual entry to maintain trespass, *Ryan v. Clarke*, 14 Q. B. 73. So one who takes a lease for years as a security by way of mortgage cannot bring trespass unless he has possession. *Wheeler v. Montefiore*, 2 Q. B. 133; *Turner v. Camerous*,

etc., Co., 5 Exch. 932. In *Ryan v. Clark*, 14 Q. B. 65, the court said: "It is distinctly laid down in *Williams v. Bosanquet*, 1 Brod. & B. 238, 3 J. B. Moore, 500, that entry is not necessary to the vesting of a term of years in the lessee; the interest and the legal right of possession, where the term is to commence immediately, and not in the future vests in the lessee before entry, and, of course, the right of possession in the lessor is gone, though for the purpose of maintaining an action of trespass the lessee must enter, for that action is founded on the actual possession."

termination of the lease is inserted in it and this is inconsistent with the length of the term measured from the date stated for the commencement of the lease, the court will correct the error which is apparent upon the face of the lease. Thus, where the lease was for the "term of six months from the 6th day of December, 1881, which term will end on the sixth day of May, 1882," the court corrected the error which was clearly an error in computation by making it read the "6th day of June, 1882."⁷ Where the term is to end on a specified date, as for example, "twenty years from the 25th day of next March," the term is not complete nor is it ended until the last moment of the 25th day of March in the last year of the term.⁸ If, from the language of the lease, it is uncertain and doubtful upon what date the term is meant to expire, the tenant, it seems, and not the landlord, may elect to terminate it upon that date which is most beneficial to him.⁹ If the day upon which the tenant is bound to vacate the premises according to the date of the expiration of the term as set forth in the lease, falls upon a Sunday, the tenant has until the following Monday at 12 o'clock to move. The respect which the law has for the first day of the week, both as a religious day and as a day for necessary rest, will prevent the landlord from compelling his tenant to vacate upon that day where the removal of the tenant involves also the performance of manual labor in removing his personal belongings. The retention of the possession by the tenant until the following Monday after the Sunday on which his term has expired, is not therefore such a holding over as will entitle the landlord to continue to regard him as a tenant.¹⁰

⁷ *Nindle v. Bank*, 13 Neb. 245, 247.

⁸ *Ackland v. Lutley*, 1 P. & D. 636, 9 A. & E. 879, 8 L. J. Q. B. 164.

⁹ *Murrell v. Lyon*, 30 La. Ann. 255.

¹⁰ See *Salter v. Burt*, 20 Wend. (N. Y.) 205; *Jones v. Shears*, 4 Ad. & El. 832. In New York, by custom which has acquired the force of law all tenancies commencing on May 1st for one year terminate on the first day of the

following May at 12 M. *Marsh v. Masterson*, 3 N. Y. Supp. 414, 415; *Wilcox v. Wood*, 9 Wend. (N. Y.) 346, and it has been the immemorial usage to exchange possession at 12 o'clock noon. See as to the same custom in Pennsylvania, *Marys v. Anderson*, 24 Pa. St. 272, 276; *Insurance Co. v. Myers*, 4 Lanc. Bar. 151. In *People ex rel. Elston v. Robertson*, Barb. (N. Y.) 9, 17, a distinction is made between a lease to end *on* the 1st day of May and a lease *to* the 1st

§ 245. **A reversion in the lessor.** In order that an instrument shall be regarded as a lease, there must be a reversion in the lessor. The instrument need never expressly state that there is a reversion in the lessor as this may be shown by parol evidence. It follows from this that the instrument which is a lease must convey a less estate than the landlord possesses. If the instrument conveys all the interest of the landlord, it is an assignment and not a lease. The words which are employed in the instrument itself are not always conclusive upon the question whether it is a lease or an assignment of a lease. Hence, where a lessor parts with his whole interest to another, it is an assignment though he may call the instrument which conveys his interest a lease. So the fact that a lessor uses the word "demise" in assigning his lease does not change the effect of the writing for the reason that the word "demise" is often used in a general way as the equivalent of the word "convey," and may properly be applied to the conveyance of an estate in fee or other freehold estate as well as to the lease.¹¹ So, if a lessee for three years expressly demises his term for four years, it is not in any sense of the word a lease, but is in its operation a fixed and valid assignment of all his premises.¹²

§ 246. **The approval of the lease by the attorneys for the parties.** It is sometimes customary to insert in an agreement to make a written lease, a provision that the writing shall be subject to the approval of the attorneys of the respective parties. The insertion of a clause providing for the approval of attorneys or solicitors does not necessarily prevent informal writings from being regarded as a lease or indicate that a formal lease is to be executed. The insertion of the words "to be approved by me and my solicitor" in a letter offering to make a lease where the offer was accepted in writing by the other parties, does not prevent these letters from being considered as a complete contract to make a lease.¹³ Where an intended lessee writes a letter which contains all the language necessary to a contract with a provision

day of May. It is there held that the term created by the former lease ends on the 1st day of May at 12 M., while the latter expires at 12 o'clock on the night of April 30th.

¹¹ 2 Inst. 483.

¹² Hicks v. Downing, 1 Ld. Rayd. 99.

¹³ Eadie v. Addison, 62 L. J. Ch. 80, 47 L. T. 543, 31 W. R. 320.

"that such lease is to be approved in the customary way by my solicitor," and the offer in the letter is accepted, there is a complete and binding contract which may be specifically enforced though the solicitor of the lessee refused to approve the lease or to complete it. The meaning of the provision for the approval of the solicitor was that he was to see to it that nothing irregular informal or unusual was inserted in the lease, which was to be executed to carry out this agreement.¹⁴ Under an agreement for a lease which is to be approved by the parties' attorneys, the attorneys have no right arbitrarily to refuse to approve it. The refusal of either to be effective to release his principal from the obligation to execute the lease must be based on reasonable grounds. For, presumptively at least, the approval must be prior to or contemporaneous with the execution of the lease by the parties and not subsequent thereto. If both attorneys approve the proposed lease, their clients are bound to execute it or accept the consequences. If either attorney arbitrarily and without a good and sufficient reason refuses to approve the lease according to the agreement, his client is in default and the other party to the agreement may sue for damages or to compel a specific performance of the contract to make a lease without a tender of an executed lease on his part. Nor need he ask a court of equity to reform the agreement so as to dispense with the approval of the attorney. It is for him to show that the approval was unjustly refused and if he shall do this, the giving of the approval may be dispensed with under the equitable rule that equity will presume that thing to have been done which ought to have been done.¹⁵ If the parties to an

¹⁴ *Chipperfield v. Carter*, 72 L. T. 487.

¹⁵ *Pittsburgh Amusement Co. v. Ferguson*, 100 App. Div. 453, 457, 91 N. Y. Supp. 427; *Sibbald's Case*, 83 N. Y. 384. "If in the case of a proposed sale, or lease of an estate to persons agreeing to all the terms, and saying 'we will have the terms put into form,' then all the terms being put into writing and agreed to, there is a contract. If two persons agree in writing that up to a

certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor and shall be such as are approved of by him, then there is no contract because all the terms have not been settled. Now with regard to the construction of letters which are relied upon as construing a contract, I have always thought that the authorities are too favorable to specific performance. When a man agrees to buy an estate there are

agreement for a lease actually enter into such an agreement, the mere fact that they sent it to a solicitor or an attorney, with instructions to prepare more formal documents is immaterial. The agreement, though informal, will be treated as final, and its character as a final agreement will not be destroyed nor its validity as a writing upon which specific performance may be procured affected by the fact that a solicitor is to recast its form. If, on the other hand, the parties in negotiating use letters, or if they have made a memorandum of an agreement which in either case is not signed by both of them, or from some circumstance appearing in the evidence, is not shown to be an agreement to make a lease, the mere fact that they sent the papers to a solicitor to have them put in a form which is to be afterwards approved by them, is some evidence that they do not regard the memorandum as final and do not bind themselves by a lease, or an agreement to make one until it is reduced to a proper form.

a great many more stipulations wanted than a mere agreement to buy the estate, and the amount of purchase money that is to be paid. . . . When therefore you see a stipulation as to a formal agreement put into a contract, you may say it was not put in for nothing, but to protect the vendor against that very thing. Indeed, notwithstanding protective conditions the vendor has not unfrequently to allow a deduction from the purchase money to induce the purchaser not to press a requisition which the law allows him to make. All this shows that contracts for the purchase of lands contain something more than can be found in the short and meager form of an ordinary letter. When we come to a contract for a lease, the case is still stronger. When you bargain for a lease simply, it is for an ordinary lease, and nothing more; that is, a lease containing the usual covenants and nothing more; but when the bar-

gain is for a lease which is to be formally prepared in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, that is, covenants which are not comprised in or understood by the terms 'usual covenants.' It is then only rational to suppose that when a man says there shall be a formal contract approved for a lease, he means that more shall be put in the lease than the law generally allows. Now in the present case, a plaintiff says in effect: 'I agree to grant you a lease on certain terms, but subject to something else being approved.' He does not say: 'Nothing more shall be required beyond what I have already mentioned,' but 'something else is required,' which is not expressed. That being so, the agreement is uncertain in its terms, and consequently cannot be sustained." By Jessel, M. R., in *Winn v. Bull*, 7 Ch. Div. 29, 31.

In each case, however, the intention of the parties is a question of fact upon all the circumstances.¹⁶

§ 247. **The responsibility of the tenant.** The landlord, if he is wise, will, before executing a lease, ascertain that he is dealing with a responsible tenant. He may make the condition that prior to the execution of the lease, the tenant shall show that he is financially responsible. The landlord must be allowed a reasonable time to look up the references given him by his prospective tenant. On the other hand, he must use due diligence in making his inquiries regarding the financial condition of his tenant. If negotiations for a lease are pending and the minds of the parties have met on the terms of the lease, and negotiations are suspended for the purpose of enabling the landlord to ascertain whether the tenant is responsible, the landlord cannot prolong his investigation for an unreasonable period. If he shall do so, he is alone to blame if the tenant shall treat his silence and delay as a refusal to give the lease. The tenant is entitled to know within a reasonable time whether or not his references are satisfactory and what shall be a reasonable time depends upon the circumstances of the case, as for example, the difficulty that the landlord may have in ascertaining the facts which will enable him to accept or reject the tenant. If he finds the references are unsatisfactory, he must reject promptly. The landlord cannot also arbitrarily declare that references furnished to him are insufficient if, in fact, they ought to satisfy him. The question whether references are sufficient, and whether the tenant is a responsible person is for the jury to determine. If the information which the landlord obtains from the parties to whom the tenant referred should satisfy a reasonable man in view of all the circumstances that the tenant was responsible, the landlord ought to be satisfied and if such is the case, then he is liable to the tenant for an arbitrary refusal to permit him to have the lease. In an action by the tenant for damages for the landlord's failure to execute a lease which was agreed upon, subject to the result of inquiries as to the tenant's responsibility, the jury should find for the tenant, if they find that the landlord ought to have been satisfied, and as a part of this they may find on all

¹⁶ *Ridgway v. Wharton*, 6 H. L. Cas. 238, 27 L. J. Ch. 46, 4 Jur. (N. S.) 173, 5 W. R. 804.

the evidence that the tenant was a responsible person and ought to have been accepted by the landlord.¹⁷

§ 248. **A failure to read the lease.** As a general rule of the law of contracts, it is well settled that where a person, having the ability to read a written contract, signs it without reading it, and without requesting it to be read to him, and no fraud or trick is used upon him to prevent him from reading it, he is bound thereby to the same extent as though he were familiar with its contents.¹⁸ This rule is applicable to written leases. If the parties can read, each ought to read it for himself. If one or both cannot read, it should be read for the benefit of the illiterate party or parties to it. Neither party, being himself unable to read, has a right to rely upon the other reading it for him; nor should he accept any statements of the other as to the contents of the lease, unless some relation of trust or confidence exists between them.¹⁹ And where a lessor does not occupy such a position of trust or confidence to the lessee as will entitle the latter to rely upon the representations of the lessor, the fact that the lessee, being illiterate, is induced to execute a written lease by the lessor suppressing certain parts in it in reading it which are material, does not justify the rescission of the lease by the lessee for the fraud of the lessor.²⁰ If the les-

¹⁷ Ward v. Smith, 11 Price, 19.

¹⁸ McKinney v. Herrick, 66 Iowa, 414, 23 N. W. Rep. 767; Gullihier v. Chicago, R. I. & P. R. Co., 59 Iowa, 416, 13 N. W. Rep. 429; Watson v. Planters' Bank, 22 La. Ann. 14; Allen v. Whetstone, 35 La. Ann. 846; Sanborn v. Sanborn, 104 Mich. 180, 62 N. W. Rep. 371; Quimby v. Shearer, 56 Minn. 534, 58 N. W. Rep. 155; Robinson v. Jarvis, 25 Mo. App. 421; Penn v. Brashear, 65 Mo. App. 24, 2 Mo. App. Rep. 1132; Wheeler v. Mowers, 74 N. Y. St. Rep. 950, 16 Misc. Rep. 143, 38 N. Y. Supp. 950; Dellinger v. Gillespie, 118 N. C. 737, 24 S. E. Rep. 538.

¹⁹ Lindley v. Hoffman, 22 Ind. App. 237, 53 N. E. Rep. 471; Rob-

inson v. Glass, 94 Ind. 211; Webb v. Corbin, 78 Ind. 403.

²⁰ Binford v. Bruso, 22 Ind. App. 512, 54 N. E. Rep. 146. A contract just and reasonable in its stipulations between competent parties is not void solely because one of the parties who signed it did not when he signed know its contents in the absence of fraud on the part of the other. New York, L. E. & W. R. Co., 8 Ohio Cir. Ct. Rep. 593. See, also, Krause v. Stein, 173 Pa. St. 221, 33 Atl. Rep. 1031. In opposition to the rule of the text that neither party has a right to rely upon the reading to him of the lease by the other party, it has been held in some cases that a tenant is authorized to rely upon the land-

sor, knowing that the lessee cannot read, reads the lease for him, he will be held to the strictest good faith, and if he misrepresents its provisions either by omitting to read clauses which are actually in it or pretends to read from it clauses which are not in it so that the lessee is deceived thereby, and by reason thereof executes the lease relying upon the landlord reading it, the lease is void for fraud, and if the tenant has entered, he cannot be held under the written lease, but is simply a tenant at will under an agreement for a lease.²¹ The omission of a lessee to read the lease before he executes it, does not prevent him from obtaining reformation of it, if he could read little English himself and relied upon some other person to read it for him.²²

§ 249. **A mistake in the execution of a lease.** Courts of equity have a general and broad jurisdiction to correct mistakes which occur in the preparation and execution of written instruments which in its more minute details and application to the affairs of men is more properly to be discussed in a work treating of equitable remedies than in this place. Here it may suffice to say that a lease will be rescinded for mistake only where the mistake is as to some fact which is material to the transaction

lord's statements of the contents of the lease where the latter has prepared it or procured it. *Powell v. Lynde Co.*, 64 N. Y. Supp. 153, 155, 49 App. Div. 286; *Grosvenor v. Green*, 28 Law J. Ch. 173; *Wilson v. Hart*, 1 Ch. App. 463.

²¹ *Knoepker v. Redel*, 116 Mo. App. 62, 92 S. W. Rep. 171.

²² *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. Rep. 106. The rules in regard to the reading of a written instrument for the benefit of illiterate parties are thus summed up in *Lindley v. Hoffman*, 22 Ind. App. 237, 53 N. E. Rep. 471. "It will be observed in all cases cited where this general rule has been discussed the decisions have been grounded on two basic propositions: (1) That the execution of the instrument must have been

procured by fraud, deceit and misrepresentation, and (2) that the party executing it must have been free from negligence in affixing his signature thereto. It is not enough that he executes the instrument when he thought and believed that he was executing an entirely different one, but he must be induced to execute it by fraud, deceit, etc., and he must be free from laches and negligence on his part. If he can read he must read it for himself. If he cannot read, he must have some one upon whom he can rely to read it for him if that is possible; for as a general rule, as we shall presently show, he has no right to rely upon the adverse party to read it for him."

and which affects the interests of lessor and lessee in some substantial manner. If the mistake was as to some trivial or unimportant matter, a court of equity will not interfere between the parties to the lease to give relief. So, too, the mistake must have been mutual as would be the case where both the parties to a lease had agreed by parol upon all its terms and in committing these terms to writing and on executing the writing, something material and important previously agreed on had been omitted by the scrivener from the written lease without the knowledge of either party. In such a situation of affairs, equity will insert and supply what the parties have omitted in order to effectuate their real intention. For the mistake must have been unintentional as well as mutual and the party who is seeking to have it corrected must show that he was free from negligence in considering the language of the writing he wishes to have corrected or in his understanding of the facts and circumstances of the case.²³ These rules regulate the remedy in cases of a mistake of fact and it is often said that only mistakes of fact will be relieved against. This statement is correct if the mistake of law consists only and exclusively in a misunderstanding of the legal effect of a transaction by a party who has a full and intelligent knowledge of all the facts. But a mistake of law which would be relieved against occurs where the parties have fully agreed by parol upon the terms of a lease or other writing, without any mistake of law or fact and they themselves or their agent in reducing the lease to writing, use words and phrases, whether technical or not, under a mistake as to their legal effect and which do not represent the intention of the parties as embodied in their oral agreement. Equity will relieve against a mistake of this sort occurring in a lease though it be called a mistake of law, for the contract, as written, does not represent the true intention of the parties. But where the parties have accurately expressed their final intentions in the lease and there is no mistake of fact in the preliminary negotiations, equity will not relieve against a mistaken interpretation of its language by a party to it which has, without any fraud on the part of the other, resulted in injury to him.

²³ *Bluestone Coal Co. v. Bell*, 38 Irick v. *Fulton's Ex'r*, 3 Gratt. W. Va. 297, 18 S. E. Rep. 493, 497; (Va.) 192.

§ 250. The usual and customary covenants and provisos. A contract to make a lease, which states only that the lease is to contain the "usual covenants," means thereby that such covenants shall be comprised in the lease as are fit and proper according to the nature of the lease which is to be made. Though the contract does not stipulate for the "usual and proper covenants," yet certain covenants will be inserted or implied. What shall be considered usual covenants depends upon the circumstances, that is to say, upon the nature of the property itself and upon the use which is to be made of it and also upon the customs of that portion of the country where that property is located. Where the parties have expressly stipulated for the usual covenants, what are usual covenants is a question of fact to be determined from the circumstances. The court will always receive parol evidence to determine the meaning of these words.²⁴ If the agreement for a lease does not require the usual covenants to be inserted, it is a question of law for the court to determine what covenants the parties are entitled to. In construing a stipulation for usual covenants, it has been held that the lessor cannot compel the insertion of covenants in restraint of trade where the premises are located in a business section.²⁵ Nor can he require a restriction in the lease against a particular trade where the agreement for a lease contained no stipulation for such a covenant.²⁶ A covenant on the part of a tenant to keep premises insured is not a usual covenant nor is it a usual covenant for the landlord to agree to rebuild in case the premises are destroyed by fire with a stipulation that the rent shall cease on his failure to do so.²⁷ A covenant to pay taxes is in England a common covenant in a lease which reserves a net rent, and a provision that upon the breach of such a covenant in the lease of a public house, the landlord may re-enter for a breach of such a covenant is also usual.²⁸ Under an agreement to lease premises by a lease to contain all usual and necessary cove-

²⁴ *Bennett v. Womack*, 3 C. & P. 96, 93.

²⁵ *Wilbraham v. Livesey*, 18 Beav. 206, 2 W. R. 281; *Van v. Corpe*, 3 Myl. & K. 269, 6 L. J. Ch. 208, 1 Jur. 101, 149.

²⁶ *Prospect v. Parker*, 3 Mylne & K. 280.

²⁷ *Doe v. Sandham*, 1 T. R. 705; *Medwin v. Sandham*, 3 Swanst. 685.

²⁸ *Bennett v. Womack*, 7 B. & C. 627, 1 M. & Ry. 644, 3 Car. & P. 96, 6 L. J. (O. S.) K. B. 175,

31 R. R. 270.

nants, it has been held that a covenant not to assign is a usual and customary covenant.²⁹ But there are many cases which hold that a covenant not to assign without the landlord's consent or license is not a usual covenant.³⁰ Thus, it will be seen on comparing the cases on and for this proposition that the weight of the decisions is decidedly on the side of the latter proposition. Whether under a provision in an agreement for a lease that the usual covenants are to be inserted in the lease, the lessor shall be entitled to have a power of entry upon the breach by the lessee of a covenant, has been differently decided. It has been held that a lease ought to contain a power of re-entry on the lessee becoming bankrupt.³¹ But it has also been held that such a power of entry is unusual and that an intended assignee of a lease is not bound to accept a lease containing such a provision unless he has expressly agreed to do so.³² And it has also been held that, as a general rule, a landlord is not entitled to have a provision for re-entry inserted in the lease as a usual and customary provision on the breach of any covenant in the lease, except for the breach of the covenant to pay rent.³³ An agreement for a lease to contain the usual and necessary covenants and particularly to contain a covenant by the tenant to keep the premises in good repair, requires that he shall covenant to repair generally without any exception therein of damages by fire or tempest.³⁴

²⁹ *Morgan v. Slaughter*, 1 Esp. 8, 5 R. R. 715; *Haberdashers' Co. v. Isaac*, 3 Jur. (N. S.) 611, affirmed 5 W. R. 855; *Folkingham v. Croft*, 3 Anstr. 700, 4 R. R. 844.

³⁰ *Hampshire v. Wickens*, 47 L. J. Ch. 243, 7 Ch. D. 555, 38 L. T. 408, 26 W. R. 491; *Buckland v. Papillon*, L. R. 1 Eq. 477, 12 Jur. (N. S.) 155, affirmed 36 L. J. Ch. 81, L. R. 2 Ch. 67, 12 Jur. (N. S.) 992, 15 L. T. 378, 15 W. R. 92; *Browne v. Raban*, 15 Ves. 528; *Bell v. Barchard*, 16 Beav. 8, 21 L. J. Ch. 411; *Henderson v. Hay*, 3 Bro. C. C. 632; *Hampshire v. Wickens*, 7 Ch. D. 555, followed in *Bishop v. Taylor*, 60 L. J. Q. B. 556, 64 L. T. 529, 39 W. R. 542, 55 J. P. 695;

Lander and Bagley's Contract, In re, 61 L. J. Ch. 707; (1892) 3 Ch. 41, 67 L. T. 521, following *Henderson v. Hay*, 3 Bro. C. C. 632.

³¹ *Haines v. Burnett*, 27 Beav. 500, 29 L. J. Ch. 289, 5 Jur. (N. S.) 1279, 1 L. T. 18, 8 W. R. 130.

³² *Hyde v. Warden*, 47 L. J. Ex. 121, 3 Ex. D. 72, 37 L. T. 567, 26 W. R. 201.

³³ *Hodgkinson v. Crowe*, 44 L. J. Ch. 680, L. R. 10 Ch. 622, 33 L. T. 388, 23 W. R. 885; *Anderton and Milner, in re*, 59 L. J. Ch. 765, 45 Ch. D. 476, 63 L. T. 332, 39 W. R. 44.

³⁴ *Sharp v. Milligan*, 23 Beav. 419; *S. C.*, *Nom. Thorpe v. Milligan*, 5 W. R. 336.

In conclusion, it may be said that the usual tenant's covenants are (1) to pay rent; (2) to pay taxes, except those expressly made payable by the landlord; (3) to keep and deliver in repair; (4) to permit the landlord to enter and view the premises. But in the United States, a covenant on the part of the tenant to pay taxes would not be a usual covenant.

§ 251. **Leases executed in duplicate and counterpart.** Written leases of which there are two copies, one signed by each party to it, are as binding upon the other to the same extent as though there had been only one copy of the agreement or lease and both parties had signed it.³⁵ The mere fact that the parties to a lease have agreed to call one contract "an original" and one "a duplicate," does not affect the force or relevancy of the duplicate copy.³⁶ Where there is a discrepancy between the original lease and its duplicate or counterpart which cannot be explained or which is not shown to be a mistake of the person who wrote it, the lease will have precedence over the counterpart. This rule applies only to cases where there is an inconsistency between the counterpart and the original and not to a case where the terms of the lease itself are inconsistent.³⁷ Wherever it shall happen that there is a difference in the language between the two copies of a lease, parol evidence is received to show the cause of the error. The party to the lease against whom the inconsistent copy is offered may of course show that the difference or inconsistency between the copy produced in evidence against him and the copy which he has in his possession was the result of an error in copying, or that an alteration was made after he had executed the lease. Where a lease is executed in counterpart, the question may arise who is to retain the ownership and possession of the original lease and who is to have the copy or counterpart. *Prima*

³⁵ *Morris v. McKee*, 96 Ga. 611, 24 S. E. Rep. 142.

³⁶ *Crane v. Partland*, 9 Mich. 493. It has been held that a contract which was signed by both the parties and left at the office of an attorney to have a duplicate executed was sufficiently delivered. *Blanchard v. Blackstone*, 103 Mass. 343. On the other hand, the leaving of a copy of a contract

or of a lease signed by both parties with the attorney of one of them for the sole purpose of having a duplicate prepared is no delivery. *Lamar Milling & Elevator Co. v. Craddock*, 5 Colo. App. 203, 37 Pac. Rep. 950.

³⁷ *Burchell v. Clark*, 46 L. J. C. P. 115, 2 C. P. D. 88, 35 L. T. 690, 25 W. R. 334.

facie, the property in the original indenture of lease is in the lessee and that of the counterpart is in the lessor. If there is an original and a duplicate lease, the original should be delivered to the lessee. The property of the lessee in the original lease is absolute. The expiration of the term by efflux of time or by forfeiture on the part of the lessee confers no title to the original lease on the lessor as against the lessee. The lessee's right to retain the original lease after the expiration of his term is principally based upon the right he may have to sue on his lease after the term has expired to recover damages for the breach of a covenant occurring before the expiration of the term.³⁸ So a lessor who has determined a lease by re-entry for breach of covenant has no title to the lease as against the lessee.³⁹ But as against a stranger to the term, a lease and counterpart would doubtless be regarded as one instrument and both would belong to the lessor.⁴⁰

§ 252. **The mode of proving a written lease.** Where a plaintiff sues on a written lease, the rules of evidence applicable to the proof of handwriting are of service. If the lease was signed in counterpart, either party may rely upon the counterpart which is in his possession. Under the general rules, the signature may be proved either by producing an attesting witness, or by producing a witness who was present and, though not an attesting witness, saw the lease signed, or by the evidence of some person who is familiar with the handwriting of the party who is to be charged. If a lease is a conveyance within the statute it may be proved under the statute providing a conveyance or a transcript thereof, duly certified and acknowledged, in the manner prescribed by law to entitle it to be recorded, is evidence without further proof.⁴¹ Where the plaintiff is not

³⁸ Hall v. Ball, 3 Man. & G. 242, 3 Scott (N. R.) 577.

³⁹ Elworthy v. Sandford, 3 H. & C. 330. 34 L. J. Ex. 42, 10 L. T. 654, 12 W. R. 1008.

⁴⁰ Year Book, 38 Hen. VI, fol. 24, pl. 1. The counterpart of the lease in the possession of the tenant has been held in England to be of equal strength as proof in an action brought by the landlord

against the tenant for the rent. Houghton v. Koenig, 18 C. B. 235, 25 L. J. 218; Roe d. West v. Davis, 7 East, 363. The lease and the counterpart ought always to be read together and treated as one instrument for the purpose of determining their construction. Spyvy v. Topham, 3 East, 115.

⁴¹ Goodman v. Greenberg, 103 N. Y. Supp. 779.

suing on the written lease, the relation of landlord may be proved by parol evidence. Such parol evidence would consist in the admission of the party or in proof of the payment of rent by the tenant.⁴² And where the plaintiff is not suing to enforce a right under a written lease, parol evidence is received to show the fact of tenancy, though it appears that there was a written lease. Thus, where a third party brings an action against a tenant for personal injuries sustained by the tenant's negligence, it may be proved by parol that he was a tenant of a certain person.⁴³ In a case where the plaintiff relies upon a written lease, the lease itself is, of course, the best evidence and ought usually to be produced. Secondary evidence of the contents of a written lease will be received where it appears to the satisfaction of the court that the lease was destroyed; but secondary evidence will not be received merely because the party who had the lease in his possession testifies that he has misplaced it, but cannot swear positively that it is lost or destroyed.⁴⁴ A lease for years which has expired, where the possession acquired under it has been surrendered, will be presumed to have been destroyed particularly after the lapse of a number of years. Its contents may thereafter be proved by parol evidence.⁴⁵ So, where a witness testifies that he has unsuccessfully sought to find a lease among his papers, and that it was his custom to destroy all leases to get rid of them, the court will accept secondary evidence of the lease particularly in an action between third parties.⁴⁶ An unexpired lease may be presumed to have been destroyed where reasonable diligence has been unsuccessfully used to secure its production.⁴⁷

§ 253. Term expiring on the happening of contingent event.

A term may be created by the consent of the parties, the duration of which shall depend upon the happening of some contingent and collateral event. The term will then continue until the happening of such event when it will at once cease and the lessor will be entitled to immediate possession and the lessee may

⁴² Hearn v. Gray, 2 Houst. (Del.) 135.

⁴³ Central Railroad Co. v. Whitehead, 74 Ga. 441; Rayner v. Lee, 20 Mich. 384; Thompson v. Matthews, 61 N. C. 15.

⁴⁴ Burke v. Bragg, 89 Ala. 204, 7 So. Rep. 156.

⁴⁵ Hinton v. Fox, 13 Ky. 380.

⁴⁶ Kane v. Metropolitan El. Ry. Co., 15 Daly, 294, 6 N. Y. Supp. 526.

⁴⁷ Doe d. Manton v. Austin, 2 M. & Scott, 107, 9 Bing. 41, 1 L. J. C. P. 152.

vacate the premises without the service by him of any notice to quit.⁴⁸ When a lease depends upon the happening of a contingent event, the tenant as well as the landlord is bound to watch for the happening of that event and to surrender the lease as soon as it shall happen,⁴⁹ for by the happening of such an event, the whole interest of the tenant is terminated and the lessor becomes at once vested with the right of entry.⁵⁰ Thus, a lease may create a term which shall expire when another term created by a separate instrument shall cease,⁵¹ which shall last during the whole time the lessee may be postmaster,⁵² which shall terminate in case the machinery in the demised premises shall break down,⁵³ which shall terminate when another building, which is in process of construction, shall be completed,^{53a} or which shall last so long as a co-partnership continues,⁵⁴ which shall continue until the lessor sells the property,⁵⁵ or until the lessee finds another place,⁵⁶ or until the lessor who is a mortgage debtor of the lessee, shall pay him what he owes.⁵⁷ The term is contingent and uncertain where it is made for a particular number of years, or in the alternative for the life of the lessee

⁴⁸ Snook & Austin Furniture Co. v. Steiner & Emery, 117 Ga. 363, 43 S. E. Rep. 775; Scott v. Willis, 122 Ind. 1, 22 N. E. Rep. 786; Horner v. Leeds, 25 N. J. Law, 106; Russel v. McCartney, 21 Mo. App. 544; Aydlott v. Pendleton, 114 N. C. 1, 18 S. E. Rep. 971; Aydlott v. Neal, 114 N. C. 7, 18 S. E. Rep. 973.

⁴⁹ Clark v. Rhoads, 79 Ind. 342, 344.

⁵⁰ Chretien v. Doney, 1 N. Y. 419, 422. A lease in writing may be made to depend upon a contingency, and when this happens it is valid as to all its conditions. Insurance & Law Bldg. Co. v. National Bank of Missouri, 5 Mo. App. 333.

⁵¹ Eubank v. May & Thomas Hardware Co., 105 Ala. 629, 17 So. Rep. 109.

⁵² Easton v. Mitchell, 21 Ill. App. 189.

⁵³ Scott v. Willis, 122 Ind. 1, 22 N. E. Rep. 786.

^{53a} D'Arcy v. Martin, 63 Mich. 602, 30 N. W. Rep. 194.

⁵⁴ Russell v. McCartney, 21 Mo. App. 544.

⁵⁵ Clark v. Rhoads, 79 Ind. 343, 344.

⁵⁶ Hoffman v. McCallum, 93 Ind. 326.

⁵⁷ Hunt v. Comstock, 15 Wend. (N. Y.) 665, 669. Where a landowner agrees his creditor may occupy premises belonging to him for one year and until he pays a mortgage which the creditor holds, it is at the election of the owner to put an end to the term at any time after the first year by paying or tendering payment of the debt, though the money is not due, according to the terms of the mortgage for four years. Hunt v. Comstock, 15 Wend. (N. Y.) 665, 669.

or lessor or of some other person. Just what such a limitation means in a lease is a question of construction to be determined by the exact words which are employed. A lease "for the space of twenty years or during the natural life of the lessee," was held not to extend longer than twenty years in any case. It was to be contingent upon the life of the lessee, and if the lessee died before the twenty year period expired, the lease was then to come to an end. But if he should survive the twenty year period, then the term was to expire at the end of twenty years.⁵⁸ A lease to a partnership of a building owned by one of the partners for the use of the firm for the period for which the partnership is to continue is contingent upon the continued existence of the partnership. If, therefore, the partnership, for any reason such as by death of either partner, is dissolved, the term is at an end though by the articles of co-partnership the firm was to exist for a specified and certain number of years.⁵⁹ Where property is leased for a term of years to expire at the same time as another lease for a term held by the lessee, it will be presumed that the expiration of the second lease referred to is its expiration by efflux of time or by the mutual consent of the parties to it. The tenant, therefore, cannot give up the one lease at any time he may choose, as for example, as soon as he discovers it is not binding on him because it is invalid under the statute of frauds and thus secure his release from the other lease by reason of such action on his part.⁶⁰ A lease to a railroad company of land "so long as the same shall be used for railroad purposes" and which recites that the lessee is "now engaged in altering and improving the railroad depot" for the purpose of more conveniently transacting the business of said company "and for the better accommodation of the public," continues only while the land is used "for public railroad purposes." On the lessee conveying the land to an individual and the use of it for private railroad purposes, the lessor can recover possession.⁶¹ A lease of land for the purpose of enabling the tenant to remove timber therefrom may be, under some circumstances, re-

⁵⁸ *Sutton v. Hiram Lodge*, 83 Ga. 770, 10 S. E. 585.

⁵⁹ *Johnson v. Hartshorne*, 52 N. Y. 173, 177; *Doe v. Miles*, 1 Stark, 181 *Doe v. Black*, 8 C. & P. 464.

⁶⁰ *Eubank v. May & Thomas Hardware Co.*, 105 Ala. 629, 17 So. Rep. 109.

⁶¹ *Kugel v. Painter*, 166 Pa. St. 592, 31 Atl. Rep. 338.

garded as a contract for the sale of the timber and not as a mere lease of land upon which the timber is located. If the principal object of the parties is the removal and sale of the timber, the writing will be regarded as a sale and not as a lease and the rights of the parties will be adjusted accordingly. Thus, where a contract leased land with the privilege in the tenant to remove the timber therefrom and where it was apparent that the principal purpose of the parties was the purchase and sale of the timber and not the free occupation and enjoyment of the land, it was held that where the timber was all removed from the land before the end of the term specified in the lease, the right of the lessor to collect rent was at end. It would appear that from the intention of parties in such an agreement, the term itself would come to an end when the purpose of the so-called lease was accomplished, but even where the term is expressly extended so that the lessee may remain in possession if he desires to do so, the lessor cannot after the timber is all cut collect rent from the lessee for the balance of the term, though the latter may still remain in possession of the land.⁶²

§ 254. **Leases terminable on the sale of the premises.** Terms for years are not ordinarily terminable by the sale of the premises by the lessor though a contrary rule is applicable to leases at will. It is competent for the parties to a lease for years to provide by express agreement that the term shall be ended by a sale of the premises by the lessor. Such a provision is frequently very advantageous to a lessor inasmuch as he is thereby enabled to lease for a long term without any danger to himself that he will be prevented from selling his property whenever he may chose to do so because of its occupation by a tenant having a long lease. On the other hand, such a provision may be very disadvantageous to a tenant abruptly shortening his term at a moment perhaps when his occupation had become very valuable, while during its existence he will be deterred from making improvements because of the uncertain character of his tenancy. Hence, in justice to the tenant in all cases where his lease is terminable by a sale of the premises, the lessor will be held to the utmost good faith in making the sale. Unless fraud is proved, on the part of the lessor, or in other words, unless it shall appear

⁶² Baird v. Milford Land, etc., Co., 89 Cal. 552, 26 Pac. Rep. 1084.

that the sale is a mere pretence to oust the tenant, mere inadequacy of price will not render the sale ineffectual. The landlord may sell at any price and to any person, and while these facts may be taken into consideration with other facts in the case to determine whether the sale was *bona fide* they are never conclusive.⁶³ But where it shall appear to the satisfaction of the court from all the facts and circumstances that the sale by the landlord was merely going through a form of sale without any valid transfer of the legal title for a valuable consideration, but merely for the purpose of bringing the lease to an end, the sale will not terminate the lease.⁶⁴ As in all questions of good faith or fraud, the range of the evidence to determine the presence of fraud is a wide one. The court ought to have before it all the circumstances, as for example, the relation of the parties who purchase to the landlord; the consideration paid, the nature of the use to which the purchaser is to put the premises, and the statements and declarations of the parties to the sale. If the sale is made with the intention to defraud the lessee it is not necessary to show that the purchaser was a party to the fraud. It is enough to defeat the sale to show that it was prompted by an attempt to defraud on the part of the landlord. Under a lease which provides that the sale of the land by the lessor in good faith shall terminate the lease, the lease is at once brought to an end as soon as the land is sold. The tenant is thereafter a tenant at sufferance or at will and is liable to the landlord as such. The landlord may treat him as a trespasser and oust him by proper proceedings. The purchaser may, as against the tenant, take immediate possession of the premises though he must allow the tenant a reasonable time to remove his fixtures therefrom. No-

⁶³ *Dunn v. Jaffray*, 36 Kan. 408, 13 Pac. Rep. 781; *Wallace v. Bahlhorn*, 68 Mich. 87. 35 N. W. Rep. 834. A firm composed of several members owning premises leased the same "for the term of and until said premises are disposed of or sold by the said firm." It was held that the landlord might put an end to the lease by the sale of the premises in good faith to one of the members of the firm, if this

were not a mere subterfuge to bring the lease to an end. The fact that the sale was for a nominal consideration was not conclusive, though the smallness of the consideration was a circumstance which might be considered in connection with the other evidence to show the faith of the landlord. *Dunn v. Jaffray*, 36 Kan. 408, 13 Pac. Rep. 408.

⁶⁴ *Ela v. Bankes*, 37 Wis. 89.

tice need not be given by the purchaser to the tenant, but a notice by him that he has bought the land, that the lease is thereby terminated and that he takes possession is sufficient.⁶⁵

§ 255. **The option of the lessee to terminate the lease.** A lease which is determinable only at the option of the lessee and which, consequently, may continue with his consent and against a protest of the lessor is valid.⁶⁶ Thus, a lease for the term of five years and as much longer as the lessee desires, confers the right upon the lessee to continue to occupy the premises so long as he wishes to do so, and providing he fulfils the conditions of the lease, he may continue during his life time after the expiration of the five years.⁶⁷ Such leases as this are not open to the objection that they are without consideration on the part of the lessee as to the period during which he elects to remain. The rent received by the lessor during that period is the consideration for the promise of the lessor to permit the lessee to remain in possession. These leases are somewhat in the nature of leases at will, and the time or period during which the lessee may continue need not be fixed but may be wholly at his option. So, a lease of land for the manufacture of salt "for any term of years the lessee may think proper from date,"⁶⁸ or as long as certain salt works erected thereon should be used for that purpose,⁶⁹ or as long as a lessee should keep a furnace and buildings on the land,⁷⁰ is unquestionably valid. In some cases, from the terms of the lease it is doubtful whether the option to continue the term is with the landlord or with the tenant. This, of course, is always an important question. No general rule can be laid down by which it can be determined. Whether the option is with the landlord or with the tenant is a matter of construction, though the presumption in most cases, is that the option is with the tenant. Thus, an agreement that a house shall be leased for a term of thirty-one years with liberty to have the same ended at the end of any third year should it be so desired in which case

⁶⁵ *Aydlett v. Pendleton*, 114 N. C. 1, 18 S. E. Rep. 971.

⁶⁶ *Effinger v. Lewis*, 32 Pa. St. 367; *Myers v. Kingston Coal Co.*, 17 Atl. Rep. 891, 126 Pa. St. 582, 24 W. N. C. 223.

⁶⁷ *Sweetser v. McKeney*, 65 Me. 225, 227.

⁶⁸ *Harner v. Leeds*, 25 N. J. Law, 106.

⁶⁹ *Hurd v. Cushing*, 7 Pick. (Mass.) 169.

⁷⁰ *Cook v. Bisbee*, 18 Pick. (Mass.) 527.

six months' notice to quit is to be given, and if the tenant desires to have a lease executed for the remainder of the term, it was to be given, confers the option of determining the tenancy on the tenant and not on the landlord.⁷¹ Thus, it is a well settled rule of law that an agreement for a lease for a term of seven or fourteen years means that the lessee may have a lease for fourteen years which shall be determinable at his option at the expiration of seven years, not at the option of the landlord.⁷² Where a lease is granted for seven, fourteen or twenty-one years, the lessee only has the option to determine at which of the above periods the lease shall come to an end.⁷³ A lease for seven, fourteen or twenty-one years as the lessee shall think proper, is a good lease for seven years, whatever it may be for the fourteen or twenty-one years.⁷⁴ Under some circumstances and by particular language a lease may be made to terminate at a particular period or at one of several particular periods, by the joint action of the parties. If no mention is made as to who shall have the option, the option is usually with the lessee. A lease for twenty-one years determinable at the end of seven or fourteen, if the parties so think fit, is determinable only by the joint assent of both parties.⁷⁵ If the party who has the option exercises it, the lease is at an end at once for all purposes and the other party is released and any one who may have been a surety is also released. Where a lease was granted for fourteen years with a stipulation that the landlord might, if he so desired, terminate

⁷¹ *Fallon v. Robins*, 16 Ir. Ch. R. 422.

⁷² *Powell v. Smith*, 41 L. J. Ch. 734, 1 L. R. 14 Eq. 85, 20 W. R. 602.

⁷³ *Dann v. Spurrier*, 3 Bos. & P. 399, 442, 7 R. R. 797, 802, 7 Ves. 231, 6 R. R. 119; *Price v. Dyer*, 17 Ves. 363, 11 R. R. 102.

⁷⁴ *Ferguson v. Cornish*, 2 Burr. 1032, 2 Term Rep. 463, n.

⁷⁵ *Towell v. Tranter*, 3 H. & C. 458, 34 L. J. Ex. 6, 11 L. T. 317, 13 W. R. 145, in which the court said that it was likely that the parties meant that only one of them should have the option, but that the court would have to take

the intention of the parties from the word used by them. "Where the lease is granted for seven, fourteen or twenty-one years, without mentioning at whose option it is determinable, it has been decided that the option is with the lessee where the lease mentioned both parties, but it is not stated whether the option of determining it is in either party, or whether both parties are required to consent for that purpose. It is certainly open to contend that both are mentioned in order that the landlord may have an option as well as the tenant."

it at the end of seven years, on his giving notice of his desire to do so in writing, and he gave notice to quit not expressing his desire to terminate the tenancy under the proviso referring to the lease, it was held that the lease was at an end under the proviso, and that a surety of the tenant who had joined in the covenant was thereby released.⁷⁶ It is very probable that in the absence of an express provision annexing the option to continue the lease to the land an option in a tenant to extend a lease or to continue a lease would be regarded as a personal covenant which he could not assign. Thus, if the lease provided that it would continue for a certain fixed term of years and so long thereafter as the tenant desired to occupy the premises, or so long as he should desire to carry on a certain business in the premises, the option would be personal to the tenant and could only be exercised by the tenant himself. Such an option, however, may be made assignable or transferable by express language. Accordingly, a provision that if either of the parties shall desire to extend the lease or to terminate at a specified date, it shall be lawful for them or either of them or their executor or administrator to do so includes not only a personal representative of the lessor but one to whom he has devised the premises.⁷⁷ A lease which gives to the tenant an option to continue its term after a specified date must be reasonably certain in its language as to the extent of the extension or it will not be enforced in equity by a decree of specific performance. A letting to a yearly tenant and if he should wish a lease that the lessor will grant him one for seven, fourteen or twenty-one years at the same rent, is sufficiently certain for specific performance, and will be considered an optional lease for twenty-one years from the date of its making determinable at the end of seven or fourteen years at the option of the tenant. The landlord has a right to call on the tenant to exercise his option and in default of his doing so, the landlord may determine the tenancy.⁷⁸ A lessee of a coal mine for a term of years who has a right to terminate the lease in a certain time by the giving of a written notice and on the expiration of the period of notice the lease is to become

⁷⁶ *Giddens v. Dodd*, 3 Drew, 485,
492, 25 L. J. Ch. 451, 4 W. R. 377.

⁷⁷ *Roe lessee of Bamford*, v.

Hayley, 12 East, 464, 470, 11 R. R.
455.

⁷⁸ *Hersey v. Gibblets*, 18 Beav.
174, 23 L. J. Ch. 818, 2 W. R. 206.

void provided all arrears of rent shall have been paid and all agreements and covenants performed by the lessee must fully perform all covenants as such performance of covenants by him is a condition precedent to the exercise of his right to determine the lease.⁷⁹ Notice given under a provision in a lease for determining it at a certain period must agree with the notice required in the provision. A substantial compliance is all that is required. It is not necessary that it shall follow the precise language of the lease if the notice given is not contrary to it. A notice which expressly states the desire of the lessee or lessor to determine the lease at the end of a specified period will unquestionably be sufficient. But if the notice is such that from its language it may be inferred that the intention of the person giving it is to terminate the lease under his option it may be sufficient. Hence, a mere notice to quit the premises which reads, "determinable as therein mentioned," is usually sufficient.⁸⁰

⁷⁹ *Friar v. Grey*, 5 Ex. 597, 15 Jur. 814, affirmed 4 H. L. Cases, 565, 18 Jur. 1036.

⁸⁰ *Giddens v. Dodd*, 3 Drew, 485, 402, 25 L. J. Ch. 451, 4 W. R. 377. The cases in England which have placed the option in the hands of the lessee are based on the rule of law that the lease shall be taken a stronger against the lessor, as laid down in *Bath's Cases*, 6 Co. Rep. 35b. If a contract is made to make a lease for seven, fourteen or twenty-one years, there must be an option in some one to determine the length of the lease. Under the rule just stated that a lease is to be construed most favorably to the lessee it cannot possibly be considered that the option shall be in the lessor. If the provision is made in the lease that it shall be determined at the option of either party, the lessor would be entitled to take advantage of the option, but, where no such provision is in the lease, the usual construction is

that the lessee alone is entitled to continue the term which is most beneficial to him. *Dann v. Spurrier*, 3 Bos. N. P. 399-442. In the case of *Roe*, lessee of *Bamford v. Haley*, 12 East, 464, the court evidently regarded this option to procure an extension of the lease as running with the land. The court said: "The covenants by a lessor that he would renew at the end of his term has been adjudged to run with the land, and to bind the grantee to the reversion. There is no substantial difference in point of construction between the stipulation for extending the term and the stipulation for shortening it. So a covenant to renew at the request of the lessee has been held in equity to run with the estate, and to oblige the lessor to renew at the request of the lessee or executors, there being nothing in the lease to show that the renewal was intended to be confined personally to the lessee, and it being considered that the

§ 256. **Measure of the damages for a failure to execute a lease.** The lessee may recover as damages for the owner's failure to execute and deliver a lease as agreed on, the difference between the rent agreed on and the actual rental value of the premises.⁸¹ The lessor may recover as against the lessee for the failure of the latter to accept a proper lease tendered, the fair and reasonable value of the use of the land for the term, less all revenue or income the lessor may have derived from his own use of the land, or which he might have secured by the use of ordinary care and effort in letting it to another.⁸² The lessee can recover only such damages for a failure on the part of the lessor to execute the lease as he can prove in money. He must prove some pecuniary loss due to the breach of the contract and cannot recover for his disappointment, or for the trouble and inconvenience in securing other premises.⁸³ A sum of money paid to the lessor by the lessee at the commencement of the negotiations for a lease as evidence of good faith on the part of the lessee must be returned to him when, after an inspection of the premises, he refuses to execute a lease and the minds of the parties have never met on the terms of the proposed lease.⁸⁴ A deposit thus paid may be recovered by a lessee as special damages

executors were identified with the lessee. If the proviso in this case is to be construed literally, what will be the consequences? If the lessee or his executors assign, such assignee cannot give the notice, because he is not within the words, but, if any notice is to be given on his part, he must procure it to be given by the lessee or his executors. And for the same reason if the lessor dies, his heir or devisee cannot give it, but if any notice in such cases is to be effectual it must be from the executors or administrators of the lessor. Now it never could be intended that the right of determining the terms should be taken from the only person interested

in it and given to a mere stranger having no interest in it whatever."

⁸¹ Knowles v. Steele, 59 Minn. 452, 61 N. W. Rep. 557; North Chicago St. R. Co. v. Le Grand Co., 95 Ill. App. 435.

⁸² Stoker v. Wilson (Tex. 1885), Civ. Cas. Ct. Ap. § 10; Massie v. State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. Rep. 797. Only nominal damages can be recovered by either party under a contract to make a lease if the contract is unenforceable under the statute of frauds. Sausser v. Steinmetz, 88 Pa. St. 324, 326.

⁸³ D'Orval v. Hunt, Dud. Law (S. C.) 180.

⁸⁴ Equelina v. Provident Realty Co. of New York, 84 N. Y. Supp. 1014.

in addition to the general damages if it is alleged as special damages.

§ 257. **The effect of the statute of frauds on leases.** The execution of leases is, in some cases, regulated by the provisions of the Statute of Frauds. The English Statute of Frauds so far as it concerns leases, has been substantially re-enacted in some of the states. In that statute it is provided that a parol lease not to exceed a period of three years from the making thereof shall be valid. In some states no lease for a longer period than one year shall be valid unless in writing. Under the English Statute in which it is expressly provided that the period of the lease shall be measured *from the making thereof* leases in *futuro* have been held valid though for a longer period than three years if the time between the making and entry be included. The same rule has been generally recognized in the United States. Thus, a parol contract for a lease for a term of one year to begin in the future,⁸⁵ has been held not to be within the statute. Very much depends upon the language of the local statute. In the American Statutes the expression "from the making thereof" is usually omitted. This is the case in New York where by the statute a parol lease for a term exceeding one year is void. In that state it has been held that a parol lease for a year to commence in the future is not an executory contract, but vests a present interest in the term, and that, this being the case, and the time intermediate the making of the lease and its taking effect in possession, being no part of the term, a lease for one year to commence in the future need not be in writing.⁸⁶ So it has been held where the statute provides that no action could be maintained on any lease for a longer term than one year or upon any agreement

⁸⁵ Parker v. Hollis, 50 Ala. 411; Atwood v. Norton, 31 Ga. 507; Stackberger v. Mosteller, 4 Ind. 461; Wolf v. Dozer, 22 Kan. 436; Thomas v. McManus, 64 S. W. Rep. 446, 23 Ky. Law Rep. 837; Taylor v. Kincaid, 4 Ky. Law Rep. 837; Whiting v. Olbert, 52 Mich. 462, 18 N. W. Rep. 219; Jud v. Arnold, 31 Minn. 340, 18 N. W. Rep. 151; Briar v. Robertson, 19 Mo. App. 56; Bieler v. Devoll, 40 Mo. App. 251; Gladwell v. Holcombe, 60

Ohio St. 427, 54 N. E. Rep. 473, 71 Am. St. Rep. 724; Pinto v. Rintleman (Tex. 1906), 92 S. W. Rep. 1033.

⁸⁶ Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. Rep. 434, affirming 52 App. Div. 627, 65 N. Y. Supp. 200; Newton v. Musen, 61 N. Y. Supp. 61; Becar v. Flues, 64 N. Y. 518; Jones v. Marcy, 49 Iowa, 188; Sears v. Smith, 3 Colo. 287; Huffman v. Stark, 31 Ind. 474

which is not to be performed within the space of one year from the making thereof that an oral lease for a year to be begun in the future is valid.⁸⁷

§ 258. **Contracts concerning an interest in land.** The English Statute of Frauds provides that "no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action is brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The expression "interest in land" as used in the Statute of Frauds has been frequently construed in connection with contracts for the leasing of land. Thus a contract to grant a lease of a furnished flat is a contract concerning an interest in land, and the part payment of the rent is not such performance (unless possession is also taken by the tenant) as will take the case out of the statute.⁸⁸ The material part of the contract is the occupation of the premises and the hiring of the personal property is an incident thereto. So a contract to lease a house, to make alterations therein and to sell the occupant the furniture and fixtures, is a contract relating to an interest in the land. The object of the contract is the occupation of the premises, and the sale of the personal property and the agreement to make alterations are only incidental to it. For these latter things are valuable only so far as they make the occupation of the house desirable and convenient.⁸⁹ But an agreement by the landlord with his tenant that the tenant may erect

⁸⁷ *Bateman v. Maddox*, 86 Tex. 546, 26 S. W. Rep. 51. *Contra*, in *Emery v. Boston Terminal Co.* (Mass. 1901), 59 N. E. Rep. 763. An agreement by which one of the parties is to purchase land and on it erect a warehouse which the other is to hire for a term of years at a rent which is to be a certain percentage of the value of the house is a lease within the Statute of Frauds. Hence, where, in the course of building certain additions and alterations were made in it for which the tenant agreed

to pay, the landlord cannot maintain an action against the tenant for a breach of contract to take the lease or to recover what he has spent in purchasing the land and material for the building. *Bacon v. Parker*, 137 Mass. 309.

⁸⁸ *Thursby v. Eccles*, 70 Law J. Q. B. 91, 49 Wkly. Rep. 281; *Edge v. Strafford*, 1 Crompt. Jer. 391, 1 Tyr. 293; *Inman v. Stamp*, 1 Stark. N. P. 126.

⁸⁹ *Vaughan v. Hancock*, 3 C. B. 766, 16 L. J. C. P. 1.

buildings on the premises which are to be paid for by the landlord at the end of the term being in substance a sale of fixtures which are personal property is not an agreement in respect to, or concerning an interest in land within the statute.⁹⁰ The mere license to use premises for a particular purpose is not within the statute. Thus, an agreement by which the owner of a hall permits it to be used for theatrical or other entertainments, he retaining the full control of the hall and premises, in which it is located is a license and not a contract for the leasing, sale and conveyance of an interest in the land.⁹¹ An agreement by which an owner permits another person to live rent free on his land on condition that the owner should have a share of the crops is not an agreement concerning interest in land.⁹² An agreement by which an owner of a dock permits the same to be let to parties requiring the same for repair of vessels, on the payment of entrance money for the use of the dock, which is to be forfeited if the vessel does not enter at the date specified, is not an interest in land under the statute and is not required to be under seal.⁹³ The assignment of a parol lease from year to year must be in writing.⁹⁴ And a contract to procure an assignment of a lease of a house is a contract for an interest in land and is within the statute though it was made by one who was neither a lessee nor had any interest under the lease.⁹⁵ An agreement by which the tenant was to surrender his tenancy to another, and to prevail upon the landlord to accept the other as his tenant is the sale of an interest in the land.⁹⁶ A covenant restricting the use of land

⁹⁰ *South Baltimore Co. v. Muhl-
bach*, 69 Md. 395, 16 Atl. Rep. 117,
119.

⁹¹ *Johnson v. Wilkinson*, 139
Mass. 3, 29 N. E. Rep. 62. As to
the sale of fixtures not being with-
in the statute, see *Hullen v. Run-
der*, 1 C. M. & R. 266, 275; *Lee v.
Gaskell*, 1 Q. B. Div. 700; *Greene
v. Cole*, 2 Wm. Saund. 259c, 259d.
So a contract by a tenant to erect
improvements on land being a
contract for labor and materials is
not within the statute. *Pinner v.
Arnold*, 2 C. M. & R. 613.

⁹² *Poulter v. Killingbrick*, 1 Bos.

& P. 397; *Waddington v. Briston*,
2 Bos. & P. 452, 2 N. R. 355.

⁹³ *Wells v. Kingston-upon-Hull-
Corporation*, 44 L. J. C. P. 257,
L. R. 10 C. P. 402, 32 L. F. 615, 23
W. R. 562.

⁹⁴ *Botting v. Martin*, 1 Camp.
318; *Doe d. Hughes v. Jones*, 9
Mee. & Wel. 372, 1 D. (N. S.) 352,
12 L. J. Ex. 265, 6 Jur. 302.

⁹⁵ *Horsey v. Graham*, 39 L. J.
C. P. 58, L. R. 5 C. P. 9, 21 L. T.
530, 18 W. R. 141.

⁹⁶ *Cocking v. Ward*, 1 C. B. 868,
5 L. J. C. P. 245.

is within the statute of frauds. An agreement the sole object of which is the creation of such a covenant, would therefore be invalid unless in writing. So, too, an agreement to make a lease in the future, the intention of which is that there shall be inserted in the lease a covenant which in effect shall provide that the lessee shall sell only the goods produced by the lessor, is within the statute and if in parol, is not enforceable.⁹⁷ A contract by a landlord who has leased his premises in writing to lay out certain money in making improvements upon them, the tenant to pay an increased rent, is a mere collateral agreement. It is not a contract concerning or relating to an interest in land, because the tenant by it receives no additional interest in the land. All the landlord agrees to do is to remove certain articles of personal property and substitute others in their place in the way of alteration. Nor does the agreement that the tenant is to pay an additional sum which is called rent alter the case, for this is not rent in the legal sense inasmuch as it could not be distrained for nor could the landlord re-enter for its non-payment. The court also held that there was no presumption that the parties by this agreement intended to make a surrender of the old lease and to grant a new lease but that all they meant was making a personal contract to pay and receive a certain sum per year.⁹⁸ So upon the same principle where the premises at the time of the execution of a written lease are in bad repair and the landlord agrees to put them in a condition fit for habitation his oral promise is collateral to the writing and it is not an agreement for or concerning an interest in the land.⁹⁹ So, in general it may be laid down as a rule that all contracts to repair or to furnish a house which are collateral to a written lease and which are made subsequent thereto, and for which the written lease is a consideration are not within the statute. The reason for this is that they did not convey an interest in the land because the tenant has already acquired all the interest in the land which he had agreed

⁹⁷ *Mausert v. Christian Feigen-span*, 68 N. J. Eq. 671, 63 Atl. Rep. 610, 64 Atl. Rep. 801. A parol contract to make a lease for years is within the statute of frauds. *Smith v. Phillips* (N. H.), 43 Atl. Rep. 183. An assignment of rent due under a written lease for a

term of years must be in writing. *King v. Kaiser*, 23 N. Y. Supp. 21, 3 Misc. 523, 52 N. Y. St. Rep. 487.

⁹⁸ *Donellan v. Read*, 3 B. & Ad. 899.

⁹⁹ *Mann v. Nunn*, 43 L. J. C. P. 241, 30 L. T. 526.

to receive and these subsequent contracts are usually made merely for the purpose of enabling him more conveniently to enjoy that interest.¹ The question has been agitated whether an oral lease which is good under the second section of the statute is valid, under the fourth section which refers to contracts "concerning an interest in land." It cannot be denied that a lease is a contract concerning an interest in land, and hence, if the fourth section is applicable parol leases for any term are void though by the second section of the statute parol leases not exceeding three years are valid. The result of this construction would be that a lease which would be valid by one section would be void by another. In endeavoring to reconcile this apparent inconsistency the English courts have held that parol leases not exceeding three years from the making were valid and that they might be sued upon under their character of leases but that before the entry of the tenant they did not confer the right on the lessor to sue for damages for not taking possession.² The dis-

¹ *Morgan v. Griffiths*, 23 L. T. 783, L. R. C. Exch. 70; *Angel v. Duke*, 44 L. J. Q. B. 78, L. R. 10 Q. B. 174, 32 L. T. 23, 23 W. R. 307. See, also, to the same effect, *Hoby v. Roebuck*, 2 Marsh. 433, 7 Taunt. 157, 17 L. R. 477; *Nachbour v. Wiener*, 34 Ill. App. 237. The following agreements have been held to be contracts concerning an interest in land: An agreement to build a store and have it ready for occupancy on a certain date and then to lease it for a term of years. *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586; *Bacon v. Parker*, 137 Mass. 309. An agreement that a party should occupy a meadow for three years as a compensation for clearing it. *Scoten v. Brown*, 4 Har. (Del.) 324. A written contract to sell a stock of goods, the seller agreeing orally to give the buyer a three years' lease of the store room. *Strehl v. D'Evers*, 66 Ill. 77. A contract conveying the

right to use for the purpose of worship a church edifice when the same is not used by the church. *Brumfield v. Carson*, 33 Ind. 94, 5 Am. Rep. 184. A contract for a pew in a church for a period extending beyond one year. *First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28. The following contracts have been held not to relate to an interest in land: A contract with an owner to work land for a part of the proceeds. *Himesworth v. Edwards*, 5 Har. (Del.) 376. A contract giving the right to use land as a play-ground in connection with a school house, so long as the school house should stand. *District Township of Corwin v. Morehead*, 43 Iowa, 466. An oral agreement to pay for board and lodging. *White v. Maynard*, 111 Mass. 250, 50 Am. Dec. 28.

² *Edge v. Strafford*, 1 Crompt. & Jer. 391.

tion is of no value because a lease after the lessee enters is just as much an interest in land as it was before. And if it is invalid in part it must be totally invalid. The true construction of the statute seems to be a parol lease not exceeding three years is good from its beginning and will support an action against the lessee for rent though no entry has been made upon it.³

§ 259. **Extensions and renewals of leases.** A tenant who has the right to a renewal of his lease must exercise that right according to the provisions of his lease. His right to a renewal is a part of his original contract. Though it is called a right to a renewal it is not strictly speaking a right to create a new lease but a right to extend the old lease. Hence, if the tenant exercises his right to a renewal according to the provisions of his lease his term is extended so as to bind the lessor without any action, affirmance or extension on the part of the lessor. And the extension is by virtue of the original lease. There can be no question of the application of the Statute of Frauds under such circumstances. The holding under the new lease is protected by the fact that the old lease is in writing. The original lease creates and defines the term. If the tenant elects not to exercise his right to extend the lease then the term is at an end. If he elects to extend the lease then the extension is merely a prolongation of the term of the first lease,⁴ and not the creation of a new term. Thus, it has been held in connection with a holding over after the tenant has given a notice of an intention on his part to renew that the notice itself is not the instrument under which he holds but that the tenant is holding under the original lease.⁵ If, however, during the term or at the termination of a lease, even though the lease gives the tenant an option for an extension, the parties shall make a new or supplemental lease, the possession under the former lease will not take the new lease out of the statute.⁶ Where the tenant holds over after the expiration of a written lease it will be presumed that his holding over is under the former lease. If the new lease is void because in parol the

³ Bolton v. Tomlin, 5 Ad. N. E. 856.

⁴ Norton v. Gale, 95 Ill. 533, 35 Am. Rep. 173; McClelland v. Rush, 150 Pa. St. 57, 24 Atl. Rep. 354;

Sheppard v. Rosenkrans, 109 Wis. 58, 85 N. W. Rep. 199.

⁵ Baltimore & O. R. Co. v. West, 57 Ohio St. 161, 49 N. E. Rep. 344.

⁶ Gladwell v. Holcomb, 60 Ohio St. 427, 54 N. E. Rep. 473.

landlord may treat him as a tenant at will or sufferance and his possession will not take the new lease out of statute,⁷ and the fact that the parties in making a new lease called it an extension of the former lease does not alone take the case out of the statutes. Thus, where a lease was made between parties to an existing lease by which the terms of the lease were changed the old lease was not referred to and portions of land included in it were not included in the new lease and the terms and privileges were entirely different it was held that this was not an extension of the lease but a new contract and being in parol it was within the statute and it was not binding unless signed by the lessor.⁸ But, an agreement for the leasing of premises for a period short of a year with an option in the tenant for an extension or renewal of the lease for a period exceeding a year not evidenced by writing, is not within that clause of the Statute of Frauds which renders invalid a contract in parol not to be performed within a year.⁹

§ 260. **Leases by parol which are void under the statute.** By the Statute of Frauds in many of the states leases for a term exceeding one year not executed in writing are void.¹⁰ Hence, if the lease is for a term short of a year it is valid though not evidenced by a writing. An agreement to lease property with the privilege of a renewal for two years not in writing, is void, un-

⁷ *Crawford v. Wick*, 18 Ohio St. 190, 90 Am. Rep. 103.

⁸ *Bulles v. Noyes*, 75 Tex. 540, 12 S. W. 397.

⁹ *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. Rep. 434, affirming 65 N. Y. Supp. 200, 52 App. Div. 627.

¹⁰ *Hammond v. Winchester*, 82 Ala. 470, 2 So. Rep. 892; *Hosli v. Yokel*, 57 Mo. App. 622; *Leavitt v. Stern*, 55 Ill. App. 416; *McCroy v. Toney*, 66 Miss. 233, 5 So. Rep. 392, 66 Miss. 233; *Carney v. Mosher*, 97 Mich. 554, 56 N. W. Rep. 953; *Hayes v. Arrington* (Tenn.), 68 S. W. Rep. 44; *Ganter v. Atkinson*, 35 Wis. 48; *Bateman v. Maddox*, 86 Tex. 546, 26 S. W.

Rep. 51; *Leavitt v. Stern*, 55 Ill. App. 416; *Butler v. Threlkeld*, 117 Iowa, 116, 90 N. W. Rep. 584; *Creighton v. Sanders*, 89 Ill. 543; *Ragsdale v. Lander*, 80 Ky. 61; *Hand v. Osgood*, 107 Mich. 65, 64 N. W. Rep. 867, 30 L. R. A. 379; *Phipps v. Ingraham*, 41 Miss. 256; *Herrmann v. Hydeman*, 74 N. Y. S. 862; *Geiger v. Braun*, 6 Daly (N. Y.) 506; *Wilder v. Stace*, 15 N. Y. S. 870, 61 Hun, 233; *Id.*, 16 N. Y. S. 382, 60 Hun, 582; *Briles v. Pace*, 13 Ired. (N. Car.) 579; *Wallace v. Scroggins*, 17 Oreg. 476, 21 Pac. Rep. 558; *Sausser v. Steinmetz*, 88 Pa. St. 324; *Porter v. Groden*, 5 Yerg. (Tenn.) 100.

der the statute.¹¹ Elsewhere it is provided by the statute that a lease for more than three years must be in writing, and hence, a parol lease for five years is invalid.¹² Though a parol lease for more than three years is void, a lessee who enters becomes a tenant at will for the first year and after that on payment of rent by the year, a tenant from year to year.¹³ Parol leases for terms less than three years from the making thereof are valid under the statute of frauds and either party can pursue any remedy thereunder which may be conferred upon him by virtue of their character as leases. They do not, however, confer upon the lessor the right to sue the lessee for damages for not taking possession, and prior to the entry upon the premises by the lessee, the whole estate and right of possession remain in the lessor, the lessee having merely an *interesse termini* and nothing more.¹⁴ The operation of the statute of frauds as to the duration of leases is prospective. The statute regards only the time which the lease has yet to run. Thus, where a lease is to run from year to year, so long as all the parties please, although when six or seven years are past it may be said to be, looking backward, an oral lease for that number of years, still the lease is good, as the statute has reference only to oral leases for a certain and definite number of years to come.¹⁵ But this rule does not apply to leases from year to year, *for and during a fixed period of time* which exceeds the statutory limit.¹⁶

¹¹ *Rosen v. Rose*, 2 Ann. Cases, 194, 68 N. Y. St. Rep. 370, 34 N. Y. Supp. 467, 13 Misc. Rep. 565, 2 Ann. Cases, 194, 68 N. Y. St. Rep. 370.

¹² *Crosby v. Wadsworth*, 6 East, 602, 2 Smith, 559, 8 R. R. 556; *McClelland v. Rush*, 11 Pa. Co. C. R. 188.

¹³ *Richardson v. Gifford*, 3 N. & M. 325, A. & E. 52, 3 L. K. J. B. 122; *Beale v. Sanders*, 3 Bing. N. C. 850, 5 Scott, 58, 3 Hodges, 147, 6 L. J. C. P. 283, 1 Jur. 1083. But it has been held that a lease void under the statute cannot be used for the purpose of establishing a tenancy from year to year. *John-*

son v. Albertson, 51 Minn. 333, 53 N. W. Rep. 642.

¹⁴ *Edge v. Stafford*, 1 Cr. & J. 391; *Ryley v. Hicks*, 1 Str. 651; *Union Banking Co. v. Gittings*, 45 Md. 181, 197.

¹⁵ *Legg v. Strudwick*, 2 Salk. 414; *Birch v. Wright*, 1 T. R. 378; *Raynor v. Drew*, 72 Cal. 307; *Robb v. San Antonio St. Rep.*, 83 Tex. 392, 18 S. W. Rep. 707.

¹⁶ An assignment of a lease whose unexpired term is longer than a year is within the statute. *Chicago Attachment Co. v. Davis Sewing Machine Co.* — Ill. —, 31 N. E. Rep. 438. An oral lease of farm land which requires the

§ 261. **The character of the writing.** The writing which is required to take the case out of the statute need not have been executed contemporaneously with the transaction.¹⁷ Any writing executed by either of the parties intended to establish a contract may be given in evidence as a memorandum under the statute with parol evidence of conversations between the parties to the lease so far as is necessary to explain the subject matter.¹⁸ Thus, where the parties to a proposed lease have been negotiating for some time and the purpose of the use of the ground was for strawberry culture, a letter written by the tenant to the landlord asking whether he could have the land on the terms offered, to which the landlord replied, "set your strawberries," was held to be a sufficient memorandum to take the case out of statute.¹⁹ So, also, letters,²⁰ and telegrams,²¹ if signed by the parties to be charged may be sufficient evidence of a written contract within the meaning of the statute though they may have to be supplemented by parol evidence or by the proof of other writing not signed.²² The writing, however, in order to be operative as a memorandum, must be something more than a mere proposal for a tenancy. The writing must describe the property with reasonable certainty,²³ the duration of the term,²⁴ the rent to

tenant to sow it in wheat, whose term is one year from the spring, is invalid on account of the fact that the tenant has the implied right to enter on the land three months after the end of the year to reap the crop. *Carney v. Mosher*, 97 Mich. 564, 56 N. W. Rep. 935.

¹⁷ *Learned v. Wannemacher*, 9 Allen (Mass.) 416.

¹⁸ *Shippey v. Derison*, 5 Esp. 10; *Lowther v. Carl*, 1 Vern. 221; *Sullivan's Estate*, 23 L. R. Ir. 255.

¹⁹ *Lindley v. Tibbal*, 40 Conn. 522.

²⁰ *Alabama Gold L. I. Co. v. Oliver*, 82 Ala. 417, 2 So. Rep. 143; *Tallman v. Franklyn*, 14 N. Y. 584; *Parkhurst v. Van Cortlandt*, 14 Johns. (N. Y.) 15; *Gibson v. Holland*, L. R. 1 C. P. 1; *Palmer*

v. Marquette, etc., Co., 32 Mich. 274; *White v. Hay*, 72 L. T. 281.

²¹ *Palmer v. Marquette, etc., Co.*, 32 Mich. 274.

²² *Loomer v. Dawson, Cheeves* (S. Car.) 68; *Buxton v. Rust*, L. R. 7 Exch. 1; *Barker v. Allen*, 5 H. & N. 61; *Smith v. Neale*, 2 Com. Bench (N. S.) 67; *Reuss v. Pickslley*, L. R. 1 Exch. 342; *Warner v. Willington*, 3 Drew, 523, 25 L. J. Ch. 662, 4 W. R. 531, 2 Jur. (N. S.) 433; *Felthous v. Bindley*, 11 C. B. (N. S.) 869; *Gibson v. Holland*, L. R. 1 C. P. 1.

²³ *Lancaster v. De Trafford*, 31 L. J. Ch. 554; *Dolling v. Evans*, 15 W. R. 394; *Ogilvie v. Foljambe*, 17 R. R. 13, 3 Mer. 53.

²⁴ *Bayley v. Fitzmaurice*, 9 H. L. Cas. 78, 6 Jur. (N. S.) 124, 3 L. T. 69, 8 E. & B. 664; *Clinan v. Cook*,

be paid,²⁵ and the names of the parties.²⁶ Though parol evidence will be received in connection with the writing in order to explain it by showing the facts or circumstances by which its execution was surrendered, yet the terms necessary under the statute to be inserted in the memorandum cannot be supplied by parol. A memorandum of this character to take the case out of the statute, must be wholly in writing and cannot be shown partly in writing and partly by parol.²⁷ Letters and other communications passing between the parties during the negotiations for a lease may be connected by parol evidence even where they do not refer to one another and where they are thus connected they may constitute a sufficient memorandum in writing of an agreement to make a lease to satisfy the statute of frauds.²⁸ Thus, a letter which stated that the term was to be for twelve years but not mentioning the date of its commencement and suggesting certain covenants to be similar to those conditions in another lease is not sufficient as a memorandum.²⁹ For an executory contract for a lease does not satisfy the provisions of the statute of frauds, unless it can be collected from it on what date the term is to begin. There is no presumption that the term is to commence on the date of the agreement in the absence of proof to that effect.³⁰ If the commencement of the term can be gathered from the agreement considered as a whole, which may be supplemented by evidence of the date when the tenant went into possession, the memorandum may be sufficient to satisfy the statute.³¹ The statute requires signing, but its requirement is complied with by the insertion of the name in the instrument in any portion of it in such a manner as to authenticate it.³²

1 Sch. & Lef. 22; *Hughes v. Parker*, 8 Mee. & Wel. 244; *Gordon v. Trevelyan*, 1 Price, 64; *Dolling v. Evans*, 15 W. R. 394; *Phelan v. Tedcastle*, 15 L. R. Ir. 169.

²⁵ *Wain v. Warlters*, 5 East, 10.

²⁶ *Champion v. Plummer*, 5 Esp. 240; *Lang v. Henry*, 54 N. H. 57; *Williams v. Lake*, 2 E. & E. 349; *Williams v. Jordan*, 46 L. J. Ch. 681, 6 Ch. D. 517, 26 W. R. 230; *Warner v. Willington*, 3 Drew, 523.

²⁷ *Stead v. Dowher*, 10 Ad. & El. 57.

²⁸ *Bauman v. James*, L. R. 3 Ch. 508, 13 L. T. 424, 16 W. R. 877.

²⁹ *Cartwright v. Millar*, 36 L. T. 398.

³⁰ *Marshall v. Berridge*, 51 L. J. Ch. 329, 19 Ch. D. 233, 45 L. T. 599, 30 W. R. 93, 46 J. P. 279.

³¹ *Lander v. Bagley's Contract*, 61 L. J. Ch. 707, 1892, 3 Ch. 41, 67 L. T. 521.

³² *Ogilvie v. Foljambe*, 3 Mer. 53,

But the mere insertion of a name of a party being written in the body of an instrument by himself is not a sufficient signing under the statute, in the absence of evidence that proves he intended³³ this insertion of his name to be a signature.³⁴ An agreement for a lease though signed by both parties is not valid under the statute of frauds, so that it can be specifically performed where it was not intended to be a final contract and so expressly given, "subject to the preparation and approval of a formal contract."³⁵

§ 262. **Effect of performance in taking the lease out of the statute.** A part performance of an oral lease by the lessee by his entry, making improvements and paying rent, will take the case out of the operation of the statute of frauds to a certain extent. The entry of the tenant under a lease which is invalid under the statute of frauds creates a lease at will which is turned into a lease from year to year upon the landlord's accepting rent by the year.³⁶ So the payment of rent by a tenant in possession at an increased rate is a sufficient part performance

17 R. R. 13; *Caton v. Caton*, 56 L. J. Ch. 886, L. R. 2 H. L. Cases, 127, 6 W. R. 1.

³³ *Stokes v. Moore*, 1 Cox, 219.

³⁴ Under the English statute of frauds an agreement to make a lease must be signed at the end thereof (*Selby v. Selby*, 3 Mer. 2, 17 R. R. 1), or the name of the party to be charged must have been inserted in some place in the instrument in such a way as to authenticate it. *Ogilvie v. Foljambe*, 3 Mer. 53, 17 R. R. 13; *Propert v. Parker*, 1 Russ. & M. 625; *Caton v. Caton*, 36 L. J. Ch. 886, L. R. 2 H. L. Cas. 127, 16 W. R. 1.

³⁵ *Winn v. Bull*, 47 L. J. Ch. 139, 7 Ch. D. 29, 26 W. R. 230. Where the statute requires "an agreement made in writing signed by the parties thereto," a writing which is not signed is invalid. *Combs v. Midland Transfer Co.*,

58 Mo. App. 112. A writing which is subsequently amended by parol in respect to its details does not comply with the statutes. *Wiessner v. Ayer*, 176 Mass. 425, 57 N. E. Rep. 672.

³⁶ *Stantz v. Protzman*, 84 Ill. App. 434; *Donovan v. Brewing Co.*, 102 Mo. App. 427, 429, 76 S. W. Rep. 175; *Bless v. Jenkins*, 129 Mo. 647; *Nelson v. Brown*, 140 Mo. 580; *Hosli v. Yokel*, 58 Mo. App. 169; *Tiefenbrine v. Tiefenbrine*, 68 Mo. App. 253; *Davis v. Baldwin*, 66 Mo. App. 577; *William Wicke Co. v. Kaldenburg Manufacturing Co.*, 46 N. Y. Supp. 937, 21 Misc. Rep. 79; *Clarke v. Cincinnati*, 1 Ohio Dec. 10, 1 Jo. 53; *Grant v. Ramsey*, 7 Ohio St. 157; *Moore v. Beasley*, 3 Ohio, 294; *Wallace v. Scoggin*, 17 Oreg. 476, 21 Pac. Rep. 558; *Doe d. Brammell v. Collinge*, 7 C. B. 939, 18 L. J. C. P. 305, 13 Jur. 791

on an agreement for a lease to satisfy the statute of frauds.³⁷ In any case the performance which will take a parol lease out of the statute of frauds and make it a valid lease so far as it has been performed, must be a performance as will prevent the performing party from being placed in his former position.³⁸ A lease which is within the statute of frauds, executed by an agent without authority in writing, may be ratified by the owner, but to avoid the operation of the statute of frauds, the ratification ought to be in writing. It seems that the mere knowledge of the principal that the property has been leased by an agent for a term which is within the statute, or his action in receiving rent, or permitting improvements to be made by the tenant, is not sufficient to take the lease out of the statute. But the oral ratification of the lease of an agent made without authority, gives the tenant an estate at will which under the general rule becomes an estate from year to year by possession from year to year, and the payment of a yearly rent.³⁹ The receipt of rent by the beneficiary of a trust after the expiration of the lease which gave the tenant a right to renew is not binding on the trustee. The action of the beneficiary is not such a performance of the covenant to renew as will take the case out of the statute if it be held that the statute applies. Particularly would this be true where the trustees had refused to renew the lease and her action was without their knowledge or authority.⁴⁰

§ 263. **The recording of leases.** In almost every state of the Union it is required by statute that transfers of land, or of any interest therein, including leases, except for certain short terms, shall be recorded in the county in which the premises are located. These statutes also provide that no instrument unless it is acknowledged, shall be admitted to record. Their object is to secure to the person claiming under the recorded instrument the priority over subsequent purchasers or incumbrancers to which

³⁷ *Nunn v. Fabian*, L. R. 1 Ch. App. 35; *Miller v. Sharp*, 68 Law J. Ch. 322, 1 Ch. 622, 80 L. T. N. S. 77, 47 Wkly. Rep. 268. The contrary has been held, however, in the case of a tenant who purchases the land occupied by him by a contract in parol. *Lewis v. North* (Neb.), 87 N. W. 312.

³⁸ *Merchant's State Bank of Fargo v. Ruettel*, 12 N. D. 519, 97 N. W. Rep. 853, 855.

³⁹ *McDowell v. Simpson*, 3 Watts (Pa.) 129.

⁴⁰ *Winslow v. Baltimore & O. R. Co.*, 188 U. S. 646, 23 Sup. Ct. 443, 47 L. ed. 635.

he is entitled and at the same time to protect subsequent *bona fide* purchasers for value against secret liens and contracts of which they have no knowledge. If a lease required by the statute to be recorded is not recorded, it is void as against all subsequent purchasers in good faith and for value, not having actual notice of its existence, whose conveyances are duly recorded before it. The terms of the statute differ in respect to the leases which must be recorded.⁴¹ In some of the states it has been expressly provided that no estate in land exceeding in duration a period specified shall pass unless the conveyance thereof shall be acknowledged and recorded.⁴² In the absence of such a statute an unrecorded lease, otherwise valid, is good between the parties to it.⁴³ For the recording is no part of the execution of

⁴¹ In California all leases for more than one year (Odd Fellows' Sav. Bank v. Banton, 46 Cal. 603; Jones v. Marks, 47 Cal. 242) must be recorded. In Kentucky five years. Locke v. Coleman, 4 T. B. Mon. (Ky.) 315. In Louisiana an agreement not to sublet must be recorded. Arent v. Bone, 23 La. Ann. 387, 388. In Massachusetts, by Pub. St. c. 120, § 4, a lease for seven years or more. Collins v. Platt (Mass. 1902), 63 N. E. Rep. 946; Chapman v. Gray, 15 Mass. 439, 444; Toupin v. Peabody, 162 Mass. 473, 39 N. E. Rep. 280. In New Jersey leases for two years or more. Lembeck Co. v. Kelly, 63 N. J. Eq. 402. In New York for three years and upwards. 1 R. S. 762, § 38; Jokinsky v. Miller, 88 N. Y. Supp. 928; Beebe v. Coleman, 8 Paige (N. Y.) 392. In Pennsylvania leases for less than twenty-one years, if accompanied by possession, need not be recorded. Williams v. Downing, 18 Pa. St. 60. See City Council of Charleston v. Page, Speers (S. Car.) Eq. 159. In Vermont a lease for more than one year. Buswell v. Marshall, 51 Vt. 87. In Wash-

ington an assignment of a lease need not be recorded. Tibbals v. Iffland, 10 Wash. 451. A term to begin *in futuro*, though for less than seven years, is within a statute requiring leases for more than seven years to be recorded if the term is to endure "for more than seven years from the making thereof." Chapmon v. Gray, 15 Mass. 439, 444. By statute, in Ohio, leases of surplus water of the canals and of land connected therewith must be deposited and recorded in the office of the board of public works. Emmitt v. Lee, 50 Ohio St. 662, 35 N. E. Rep. 794. A lease for a term of ten years must be recorded under the statute. Westchester Trust Co. v. Hobby Bottling Co., 185 N. Y. 577, 78 N. E. Rep. 1114, affirming 102 App. Div. 464, 92 N. Y. Supp. 482.

⁴² Van Ness v. Hyatt, 28 Fed. Cas. 16,867, 5 Cranch, C. C. 127, affirmed in 13 Peters (U. S.) 294, 10 Law. ed. 168; Anderson v. Critcher, 11 Gill & J. (Md.) 450, 32 Am. Dec. 72.

⁴³ Barnum v. Landon, 25 Conn. 137, 149; Johnson v. Phoenix Life Ins. Co., 46 Conn. 92; Lake v.

the lease but is only a precaution which is intended to protect those who may be injured by the subsequent conduct of the parties to it.⁴⁴ An unacknowledged and unrecorded lease may be valid as against persons not parties to it if they shall have actual or constructive notice of it. The possession of the lessee under an unrecorded lease is constructive notice not only of possession but of the title and rights of the lessee to an intending lessee or purchaser.⁴⁵ Where a statute requires actual notice of a lease to be given, constructive notice is not enough. In such a case, by actual notice is meant express information communicated to, or personal service of a copy of the lease upon the person interested.⁴⁶

§ 264. **The construction of the statutes requiring record of leases.** These statutes are remedial in their character, and upon general rules and principles of statutory construction, applicable to remedial statutes their general purpose and intention are to be given effect to in all cases which are reasonably within their terms. The inclination of the courts is to extend their

Campbell, 18 Ill. 106; Wilhelm v. Mertz, 4 G. Greene (Iowa) 54; Anthony v. New York P. & B. R. Co., 162 Mass. 60, 61, 37 N. E. Rep. 780; Bramhall v. Hutchinson (N. J. 1886), 7 Atl. Rep. 573; Thomas' Lessee v. Blackemore, 5 Yerg. (Tenn.) 113; Buswell v. Marshall, 51 Vt. 87; Smythe v. Sprague, 149 Mass. 10; Earle v. Fiske, 103 Mass. 491; Ladnier v. Stewart (Miss. 1905) 38 So. Rep. 748.

⁴⁴ Barnum v. Landon, 25 Conn. 137, 149. A statute providing that unrecorded deeds of lease shall be invalid as to parties without notice does not invalidate them between the parties, or against a person not claiming an interest in the land. Anthony v. New York P. & B. R. Co., 162 Mass. 60, 37 N. E. Rep. 780. In Massachusetts it seems to have been a rule of practice that a deed must be recorded to be admissible in evidence. Where there was no

evidence of actual possession it was held in an action of trespass that an unrecorded deed of wild land was not such evidence of possession as would enable the plaintiff to maintain his action. Estes v. Cook, 22 Pick. (Mass.) 293. Where a lessee under a lease for a term sued a railroad company for damages caused by the destruction of building by fire caused by sparks from the defendant's locomotives, record at any time before the trial was finished, or perhaps before judgment was rendered, is sufficient. Anthony v. New York, etc., Co., 162 Mass. 60, 62, 37 N. E. Rep. 780.

⁴⁵ Wilhelm v. Mertz, 4 G. Greene (Iowa) 54, 55; Uhl v. May, 5 Neb. 157; Weaver v. Coumbe, 15 Neb. 167, 170.

⁴⁶ Hoping v. Burnam, 2 G. Greene (Iowa), 39; Wilhelm v. Mertz, 4 G. Greene (Iowa) 54, 56.

operation so far as may be consistent with sound principles of construction.⁴⁷ The term of years mentioned in a statute leases for which must be recorded means not only the term directly created *ab initio* by the lease but also any possible term which may be created by an extension, or a renewal or otherwise.⁴⁸ A lease for a term of years is a conveyance of lands to a purchaser of the same which is entitled and required to be recorded. A lessee is unquestionably a purchaser, for there are but two ways in which a right to the possession of land can be acquired, viz., either by descent or by purchase. Obviously a lessee does not take by descent but by purchase which occurs where a man takes land or an interest in land by his own act or agreement.⁴⁹ So, in construing statutes which permit or require "conveyances" to be recorded, it has generally been held that leases for terms of years which by the statute of frauds are required to be in writing are "conveyances" within the meaning of the statutes.⁵⁰

⁴⁷ *Toupin v. Peabody*, 162 Mass. 473, 476, 39 Atl. Rep. 280.

⁴⁸ A statute which provides that a lease for seven years from the making must be recorded means the utmost term which the lessee can claim under the lease whether the instrument directly demises a term for seven years or longer than seven years, or provides for its indirect creation by an agreement for a renewal at the option of the lessee. The intention of the statute is that a *bona fide* purchaser may rely with certainty upon the fact that no instrument which does not appear of record, and of which he does not have actual notice, can give a lessee the right to any longer term than seven years from the making of the instrument. A lease for five years with the privilege of a renewal for five years more is as much within the purview of the statute, and of the mischief which it was meant to remedy, as a lease for a term of ten years and the

reasons for requiring the latter to be recorded apply equally to the former so far as the renewal term is concerned. Hence it follows that any extension, or second term, or an agreement for a renewal which will carry the possession of the lease to more than seven years from the making of the instrument, is within the meaning of the statute. *Toupin v. Peabody*, 162 Mass. 473, 476, 39 N. E. Rep. 280.

⁴⁹ *Spielmann v. Kleist*, 36 N. J. Eq. 199, 202. See also, *Milliken v. Faulk*, 111 Ala. 658, 660, 20 So. Rep. 594. And see *contra*, *Bramhall v. Hutchinson* (N. J.), 7 Atl. Rep. 873.

⁵⁰ *Jones v. Marks*, 47 Cal. 242; *Commercial Bank v. Pritchard*, 126 Cal. 600; *Garber v. Gianella*, 98 Cal. 527; *Talley v. Alexander*, 10 La. Ann. 627; *Summer v. Clark*, 30 La. Ann. 436; *Chapman v. Gray*, 15 Mass. 439; *Toupin v. Peabody*, 162 Mass. 473, 476, 39 Atl. Rep. 280; *Spielmann v. Kleist*, 36 N. J.

Accordingly it is apparent that the word "deeds" in a statute which enacts that deeds shall be invalid or void as to subsequent purchasers or incumbrances unless they are recorded, evidently includes all instruments by which an interest in, or the title to land, may be in any way affected either in law or in equity. But the word does not include wills or leases which are by implication exempt from the necessity of being recorded by statute.⁵¹

§ 265. **The effect of recording a lease upon the rights of a subsequent lessee.** A recorded lease is constructive notice to a subsequent prospective lessee of the premises in his dealings with the lessor to the same extent and with the same effect as in the case of any other purchaser. So, too, a lessee may acquire such actual notice of a prior unrecorded lease as will estop him to dispute the rights of a lessee in possession and this notice will have precisely the same effect, so far as he is concerned, as would the lease being recorded.⁵² The subsequent lessee who finds a person in possession claiming as a lessee is at once put upon inquiry to ascertain the occupant's rights and he will be presumed thenceforth to have notice of all facts which he might have ascertained by inquiry of the lessor with whom he is dealing or by inquiry of the person claiming as a lessee. Where a lessee executes a written lease, which in express terms is made subject to the rights of a prior lessee and he also knows what the latter's rights were, the lessee takes his lease subject to all the rights of the prior lessee, including his right to a renewal.⁵³ And though the later lessee himself have no knowledge of the existence of a prior unrecorded lease, he will be presumed to have actual notice of it and of its contents where these are brought to the knowledge of his agent acting for him in the transaction.⁵⁴

Eq. 199, 203; *Lucas v. Sunbury*, etc., R. Co., 32 Pa. St. 458. See *Northwestern Ohio Natural Gas Co. v. Tiffin*, 50 Ohio St. 420, as to lease of natural gas land.

⁵¹ *Ames v. Miller*, 65 Neb. 204, 91 N. W. Rep. 250.

⁵² *Weaver v. Coumbe*, 15 Neb. 167.

⁵³ *Clarke v. Mitchell*, 51 N. H. 415, 418, holding also that unless

the prior lease provides for a written notice to renew, the subsequent lessee cannot require it of the prior lessee.

⁵⁴ *Thompson v. Christie*, 138 Pa. St. 230, 248, 20 Atl. Rep. 434, 11 L. R. A. 236, 27 W. N. C. 7. In this case a lessee holding under an unrecorded lease entered and made improvements by drilling an oil well. Subsequently the land-

§ 266. **The effect of the record as notice.** Notice of a lease derived from its record is notice of its contents. As soon as one acquires constructive notice of a lease which has been recorded, he is presumed to have notice of every word which is written in it.⁵⁵ Thus a purchaser of the premises from the lessor is bound by a covenant to renew contained in a lease which was recorded prior to his purchase and when the time has arrived when the lessee shall have the right to a renewal, he is bound to grant it.⁵⁶ The failure to copy the lease in the record does not destroy the effect of the recording as constructive notice. A lease, if it has been properly acknowledged and delivered to the recording officer for record is thereafter constructive notice to everyone, though, through the neglect of a clerk or copyist, it was never actually copied into the records. It is an incumbrance which a purchaser at a foreclosure sale under a mortgage executed subsequently to the lease is bound to take notice of.⁵⁷

§ 267. **As against the creditors of the lessor and persons claiming under him.** By the operation of the various statutes in the several states of the Union requiring conveyances of land or of interests therein to be recorded, unrecorded leases are void as against creditors of the lessor.⁵⁸ So, too, under these statutes

lord, acting on his attorney's advice, made another lease of the premises to the law partner of the attorney, which lease was recorded. The court held that the first lessee could not be ousted in ejectment by the second lessee, who had, by construction of law, knowledge or notice of all the facts which had been brought to the attention of his partner during the transaction.

⁵⁵ *Spielmann v. Kleist*, 36 N. J. Eq. 199, 206.

⁵⁶ *Taylor v. Stibbert*, 2 Ves. 439; *Hall v. Smith*, 14 Ves. 426. "Constructive notice, under the registry acts, is as efficacious as actual notice. The purpose of those acts is to make such notice the equivalent in all respects of actual notice. They declare that a

delinquent or careless purchaser or mortgagee shall be assumed to know what he would have learned had he explored those sources of knowledge which the law has provided for his information. The fact that the term granted by the lease had expired before the defendant took her mortgage cannot, in my judgment, change the rights of the parties. The record of the lease was an important link in the chain of title." By the court, in *Spielmann v. Kleist*, 36 N. J. Eq. 199, on page 206.

⁵⁷ *Reid v. Town of Long Lake*, 89 N. Y. Supp. 993, 44 Misc. Rep. 370.

⁵⁸ *Clift v. Stockdon*, 4 Litt. (Ky.) 215, 216; *Flower v. Pearce*, 45 La. Ann. 853, 13 So. Rep. 150. Where the statute invalidates a lease for

unrecorded leases which come within their operation are void as against mortgagees of the lessor,⁵⁹ or as against his vendor or other purchaser for value in good faith who buys without actual notice.⁶⁰ The record of the lease, in order to constitute a valid constructive notice of the rights of the lessee under it, to crops growing or to be grown on the land during the existence of the lease as against a subsequent chattel mortgagee of crops must definitely describe the land leased.⁶¹

§ 268. **The effect of recording a lease not required to be recorded.** The recording of a lease which is not by the statute entitled or required to be recorded is a mere voluntary act which is in no way effective to give constructive notice to parties subsequently dealing with the premises.⁶² The record of a lease not permitted to be recorded does not make it an incumbrance upon the premises of which a subsequent purchaser is bound to take notice. But the possession of the tenant under the lease not entitled to record is actual notice to the purchaser, whether he be a lessee or vendee, and he will be bound by all the facts he shall ascertain upon inquiry or which he might have obtained where he fails to make a reasonable inquiry.⁶³

more than five years when unrecorded, a lease for ten years is totally invalid, and is not good as against a creditor of the lessor, where it has less than five years to run. *Clift v. Stockdon*, 4 Litt. (Ky.) 215, 216.

⁵⁹ *City Council of Charleston v. Page, Speers* (S. C.) Eq. 159.

⁶⁰ *Milliken v. Faulk*, 111 Ala. 658, 20 So. Rep. 594; *Brown v. Matthews*, 3 La. Ann. 198; *Toupin v. Peabody*, 162 Mass. 473, 476, 39

N. E. Rep. 280; *Belding v. Flynn* (Ark.), 15 S. W. Rep. 184; *Kendall B. & Shoe Co. v. Bain*, 55 Mo. App. 264.

⁶¹ *Thurlough v. Dresser*, 98 Me. 161, 56 Atl. Rep. 654.

⁶² *Spielmann v. Kleist*, 36 N. J. Eq. 199, 203; *Graves v. Graves*, 6 Gray (Mass.) 391; *Villard v. Roberts*, 1 Strob. Eq. (S. Car.) 393.

⁶³ *Griffin v. Baust*, 50 N. Y. Supp. 905, 26 App. Div. 553.

CHAPTER XI.

THE PROPERTY WHICH IS INCLUDED IN THE LEASE.

- § 370. The scope of this chapter.
- 271. Property included.
- 272. The privileges of a tenant of a part of a building.
- 273. Description of leased premises by street number.
- 274. Exclusive right of the lessee of a hotel to use a particular name.
- 275. The tenant's right to light and air coming through his front and rear windows.
- 276. Rights as to the use of light and air as between the proprietors of adjoining premises.
- 277. The right of a tenant to use outside walls.
- 278. The use of roof for advertising purposes.
- 279. Tenant's right to show windows.
- 280. Easements of egress and ingress.
- 281. Tenant's right to use of stairways and halls.
- 282. The right to use an elevator.
- 283. Electric light as an appurtenance.
- 284. Easement of water supply.
- 285. The riparian rights of the lessee.
- 286. Right of the tenant to accretion.
- 287. Ice forming on land demised.
- 288. Lease of a mill or of a mill privilege.
- 289. Action for damages for the violation of an easement.
- 290. The protection of the tenant's easements by an injunction
- 291. Construction of the word "appurtenances." The general rule.
- 292. Things which have been held not to pass as appurtenances.
- 293. Meaning of the word "half."

§ 270. The scope of this chapter. In this chapter will be considered the extent of the rights of the tenant in connection with the use which he shall make of the demised premises. The numerous benefits which are comprised in the tenant's enjoyment of the premises will be distinguished and analyzed and the extent and character of these benefits determined. Under this head will come the various easements which are so frequently connected with the enjoyment of the possession of real estate, such as the right to light and air; the right to use water; rights of way, and certain other rights which are peculiarly modern.

In determining these rights as regards to tenant's possession, many cases will be cited which have not arisen between landlord and tenant. This is particularly the case in the section where the meaning of the word "appurtenance" is discussed, for it is considered important in connection with the above topics to discuss at length the meaning which the courts by construction and interpretation have given to this word which is of such frequent use in connection with the renting of real property.

§ 271. **Property included.** A lease of a building *eo nomine* is a lease of the land on which the building stands.¹ So, the lease of a building conveys the lands under its eaves and projections,^{1a} and to the middle of a private way in the rear the fee of which is in the owner.^{1b} But by a lease of apartments or a floor in a town for trade purposes or dwelling, the lessee takes only such interest in the subjacent land as depends upon his enjoyment of the premises rented and necessary thereto.² The word premises used in a lease may have various meanings according to the circumstances. In a contract to sell premises known by street number, it would presumptively include the land. Its meaning in a lease must be determined from the context and the character of the property. Thus a lease of the premises shown by the street number which apparently includes the whole house is a lease of the land and of the yards and gardens appurtenant if any there be. But a lease of the premises described as the first or second floor or the like is not a lease of

¹ *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Hosher v. Hestermann*, 58 Ill. App. 265; *Sherman v. Williams*, 113 Mass. 481, 484, 18 Am. Rep. 522; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401; *Hooper v. Farnsworth*, 128 Mass. 487, 488; *Lanpher v. Glenn*, 37 Minn. 4, 33 N. W. Rep. 10.

^{1a} *St. Louis Public Schools v. Hillingsworth*, 34 Mo. 191; *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522.

^{1b} *Hooper v. Farnsworth*, 128 Mass. 487, 488; *Rogers v. Snow*, 118 Mass. 118; *Gear v. Barnum*, 37 Conn. 229.

² *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Seidel v. Bloeser*, 77 Mo. App. 172. A lease of a dwelling house or other building carries with it to the tenant the right to use the land which lies under the eaves and projection of the building if that land is owned by the lessor and where the lessor under such circumstances, subsequently consented to the erection of a wall thereon or to any use of it by another it is an eviction so far as the tenant is concerned. *Sherman v. Williams*, 113 Mass. 481, 484.

any land and when the premises are destroyed, the term is at an end.³ And where the premises leased in a lease of city property is described by street number "including certain stories over the same with the buildings in the rear," it is a lease of buildings and the lessee takes no interest or estate in the land.⁴ The lease of a barn without language added to it to extend its meaning, passes only the land upon which the barn stands. It will not pass a lot surrounding the barn containing several acres, where the occupation of the lot was not necessary to the full enjoy-

³ Snook & Austin Furniture Co. v. Steiner, 117 Ga. 363.

⁴ Snook & Austin Furniture Co. v. Steiner, 117 Ga. 363, 43 S. E. Rep. 775. An agreement in writing to lease for a term "the Adams House, situate on Washington Street in Boston" may be proved by parol to have been meant to include only so much of the building as was fitted up as a hotel, by the name of the "Adams House," and not the separate shops which occupied the whole of the ground floor except the entrance. The question is what was included in the words "Adams House?" It was not described as a hotel, nor does the fact that it was built on the site of a former tavern show that it was such. There is no ambiguity on the face of the contract. But an ambiguity is at once raised when it is shown in order to identify the subject matter that there is an Adams House and that a part of it has been used for hotel purposes and that certain other parts have been used as shops, let to separate tenants, with no interior connection or any communication with the part of the building occupied and used as a hotel except that all are under one roof. To say that "house" means the whole of the

house would be plausible if the term were used in its generic sense as "my house, situated in" such a street or town. Here the word is used as a part of a proper name. If it were a conveyance in fee of the "Adams House" the implication would be very strong that every thing placed upon its site was included. But a lease is a different matter and raises another question as the hotel part may be leased and used to advantage independent of the stores and *vice versa*. This is very frequently done in cities. The case is one of a latent ambiguity. Where the very concise and plain description of the property in the lease was applied to subject it was found there were two subjects, viz., the site and the house built on it and also a tenement consisting of suites of apartments constituting the hotel proper and excluding the stores not leased or used with it down to this date. Parol evidence was admissible to show that the stores were wholly detached without any interior communication with the whole and built under and not in that portion of the structure which had been used and occupied as a hotel under the name "Adams House." Sargent v. Adams, 69 Mass. 72, 80.

ment of the use of the barn.⁵ The demise of a "furnished house and premises with gardens, pleasure grounds, coach house and stable thereto belonging" does not include a meadow adjoining the premises.⁶ A garden or court yard is usually considered an incident or appurtenant of the house. Hence, by the demise or lease of the house as such, a garden or courtyard will pass to the tenant. He will be permitted, however, to use the garden or courtyard only for such purposes as are proper and appropriate to them. He may use all the garden as a garden as well as for a passage to other parts of the premises, but he cannot divert the garden or courtyard from its former or proper use by building upon it, nor on the other hand, can the lessor build upon it while it is in the possession of the tenant.⁷ A lease of certain

⁵ *Bennet v. Bittle*, 4 Rawle (Pa.) 339.

⁶ *Minton v. Geiger*, 28 L. T. 449.

⁷ *Doyle v. Lord*, 64 N. Y. 432; *Kidder v. West*, 3 Lev. 167; *Bettisworth's Case*, 2 Co. 32a; Co. Litt. 5b; Com. Dig. Grant E. 6; *Shep. Touch.* 94; *Clements v. Collins*, 2 T. R. 502. Upon the question whether the use of a yard and its conveniences passes by a demise, see construed in *Hebbert v. Thomas*, 1 C. M. & R. 861, 5 Tyr. 503, 1 Gale, 53. A very curious case arose in England under the following circumstances. Certain land had been leased to a gas company for use in its business and while it was in their hands and being used by them there was found buried in the land an ancient boat of rather rude construction, which, in the opinion of persons qualified to know, was upward of 2,000 years old. From the facts and situation of the boat it had evidently been abandoned by its original owners on the banks of a river and had become, in the course of time, buried in the earth and had so remained for many centuries until dug out by

the employees of the gas company who was the tenant of the land. The tenant claimed it on the ground that it had become a mineral, but the court in determining the case treated this claim as absurd. On the other hand, the court treated with equal indifference the claim that it had become a fixture by having become a part of the land and said very justly that although it had become imbedded in the land it had not become a part of the land but always remained distinguished from it. The owner of the land claimed title to it upon the ground that it had become a fixture on his land, under the rule that if a man places chattels on the land of another, such, as for example, stones or bricks for the purpose of building thereon, they become the property of the person who owns the land. In repudiating the claim of the owner of the land that this boat was a chattel, the court cited several instances of certain articles, such as coins, and lamps of Roman manufacture which were found in the land and became the property of the finder,

lands, "being all that part of the park called B, situate and being in the county of O, and now in the occupation of S, lying between certain other properties described in the lease as adjoining thereto," "with all the houses, etc., now in the occupation of S," passes a house within the boundary, though not in the occupation of S.⁸ A house described as in the occupation of a certain person will pass though it is in the occupation of a tenant of that person.⁹ The fact that in the lease of a farm or land, any particular buildings are described, does not exclude from the lease other buildings which are actually on the land though not expressly described.¹⁰

§ 272. **The privileges of a tenant of a part of a building.** The lease of a part of a building carries with it for the benefit of the tenant everything which is necessarily used with or which is reasonably necessary to the enjoyment of the particular portion which he occupies.¹¹ As against his landlord, the tenant of a portion of a building has the same right to its free and uninterrupted use, both for himself and his visitors, as though he occupied the whole building. The right to occupy a separate part of a building carries with it the right to use the means of access and all other conveniences which are used in connection with the apartment when he leased it. As against tenants of other portions of the building, he is entitled to uninterrupted posses-

but in deciding the case the court placed no reliance on any of these theories and said that the only question in the case was whether the boat belonged to the landlord at the date of the lease. The court held that it did, irrespective of the fact as to whether it was a mineral or a part of the soil. If, on the one hand, it became a part of the soil it certainly belonged to the landlord; and, if it were not a part of the soil, but a chattel then it belonged to him for the reason that he owned not only the surface but everything that lies under the surface. He also had possession of the boat and for these reasons that both possession and property were in him at the time

of the execution of the lease, he, as against the tenant, was owner of the boat and it made no difference under these circumstances if the landlord had not been aware of the existence of the boat when he made the lease. *Ewees v. Briggs Gas Co.*, 55 L. T. 831.

⁸ *Jack v. McIntyre*, 12 Cl. & F. 151; *Hay v. Cumberland*, 25 Barb. (N. Y.) 594.

⁹ *Burton v. Brown*, Cro. Jac. 643.

¹⁰ *Hay v. Cumberland*, 25 Barb. (N. Y.) 594.

¹¹ *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (unof.) 340, 96 N. W. Rep. 487, 488; *Geneva Mineral Springs Co. v. Coursey*, 61 N. Y. Supp. 98, 45 App. Div. 268.

sion of every right and privilege which are necessary to confer upon him the complete and full enjoyment of the premises which he occupies.¹² Thus, for illustration, the lease of a room on the ground floor of a hotel to a ticket broker for the purpose of carrying on his business as such carries with it the use for the customers of the tenant of the door and hallway leading from any portion of the building which is necessary for the tenant's use.¹³ But no interest in the leased premises passes to the tenant of an apartment which is not directly connected with the use which he makes of the apartment.¹⁴ And an express agreement entered into by the landlord with the tenant of an apartment by which he is given the use or possession of another portion of the premises in which the apartment is located will be strictly construed and will be regarded as a license rather than as a lease. Being a license, it may be revoked, and the tendency is to construe all such extra privileges and rights which are not absolutely necessary to the enjoyment of the particular offices, flat or apartment in a restrictive sense. Thus, a clause in the lease of a loft that a tenant is to have the privilege of storing a reasonable number of cases of goods in the basement of the building in which the loft is located, being vague as to the quantity and space to be occupied by the tenant and as to the number of cases to be stored, does not constitute a lease of any part of the basement.¹⁵ A tenant of a cellar is entitled to the free and uninterrupted use of the entrance thereof on the street, but where the platform covering the outlet of a cellar was not mentioned in the lease of a cellar and the use of the platform was not indispensable to the use of the cellar, the tenant has no implied right to the platform.¹⁶ The lease of a floor in a building conveys to the lessee the right to use the front wall of that part of the building for his own exclusive use for the purpose of placing signs thereon. He may use it himself or permit another person to use it for that purpose and his permission to another person to use it is a mere license and not a lease and, conse-

¹² Section —.

¹³ Kitchen Bros. Hotel Co. v. Philbin., 2 Neb. (unof.) 240, 96 N. W. Rep. 487, 488.

¹⁴ Seidel v. Bloeser, 97 Mo. App. 172.

¹⁵ Cluett v. Sheppard, 131 Ill. 636, 639, 23 N. E. Rep. 589.

¹⁶ Hill v. Shultz, 40 N. J. Eq. 164.

quently, does not constitute a breach of a covenant against the subletting. The owner of a building letting it out in separate floors may, by express terms, except the use of the outside of the building and forbid his tenants from placing signs thereon. In the absence of such a prohibition or exception the right of the tenant to place signs thereon is unlimited, except by the rules of public policy which prevent the exhibition of signs calculated to corrupt the public morals or encourage a breach of the peace. In the same case in which the above was held the court construed the meaning of the word "floor" and held that the "first floor" of a building meant the floor of the first story. Hence, a lease of the first floor in a building apparently means a cutting out of the section of the building as a distinct tenement by an upper and lower boundary which are indicated by the words "first floor." So far as the lateral boundaries are concerned the lease of a floor presumptively includes the front or side walls by which it is bounded. So probably the lease of a floor would include all rooms, passageways and closets within the four walls surrounding the same from the exterior of said walls in both directions. A lease of a "room" as such is somewhat different. The word "floor" means a section of the building between horizontal planes and the words "in a building" attached to the word "floor" shows that a section of the whole building is meant and not simply a part of it. The word "room" on the other hand indicates a quantity of space inclosed by walls, possibly within the house itself, as well as by the separate horizontal planes. The word "room" or "rooms" presumptively excludes the outside of the side or front walls, in the absence of express language and particularly where the front walls constitute the walls of another room. Thus, it will be seen that the right to the use of the walls by the tenant of a part of the premises depends to a large extent upon the part he occupies. If he occupies a floor then the presumption is strongly in his favor that he has the use of the outside wall but if he only occupies a room the presumption is the other way.¹⁷

§ 273. **Description of leased premises by street number.** Where the premises are described in a lease by the numbers which are over the outside door opening on a street the presumption

¹⁷ *Lowell v. Strahan*, 145 Mass. 1, 12 N. E. Rep. 401.

which is always rebuttable, is that the building is meant access to which may be had from the street by means of these doors. Hence if a building has a solid partition wall extending from cellar to roof which practically makes it two structures, a tenant whose lease describes it by street numbers cannot claim that the lease covers a portion of the building not accessible by the outside doors. And it is not material that, for the convenience of a prior tenant a passageway has been cut in the partition wall of the first floor.¹⁸ The lease of land by street numbers in the absence of an express provision to the contrary conveys the use of all land entrance to which may be had from the street. It includes not only the front but the rear of the lot as well. The lessee will by implication have the right to use all stables and outhouses upon the rear of the lot, access to which may be had by a door over which the number is placed. But this rule does not apply to corner lots in the business portion of a city fronting on two streets on which are situated dwelling and business houses, which are separate and distinct.¹⁹ Where there is nothing in the lease to indicate an intention to limit the lessee's occupancy to buildings a lease of city premises by street number conveys an interest in the yard, garden and subjacent land which the lessee retains after the buildings have been destroyed or removed.²⁰ Where a lease of a house by a street number does not in terms convey the right to use a passage on the same lot beside it or to use the land in the rear to which it leads, all that the tenant holds is the right to use the passage way if its use is necessary to the complete enjoyment of the building for the purpose for which it was rented and whether the use of the passageway is necessary is a question of fact.²¹

¹⁸ *Houghton v. Moore*, 141 Mass. 437, 6 N. E. Rep. 517.

¹⁹ *Hosher v. Hostermann*, 58 Ill. App. 265.

²⁰ *P. H. Snook & Austin Furniture Co. v. Steiner & Emery*, 113 Ga. 363, 43 S. E. Rep. 775, 777. The fact that a building has a solid brick partition in it from cellar to roof without door or passageway in it raises an unavoidable presumption that the different parts were to be separately occupied. The wall makes

the structure two tenements as distinctly as if they had been built on separate blocks. When a house or building is described in a lease by street numbers over the outside doors the inference is that a building is intended access to which is reached by these doors. *Houghton v. Moore*, 141 Mass. 437, 6 N. E. Rep. 517.

²¹ *Patterson v. Graham*, 140 Ill. 531, 535, 30 N. E. Rep. 460, affirming 40 Ill. App. 399.

The presumption that a lease by street number includes only such buildings as are located upon the lot thus numbered is not rebutted by a clause granting to the lessee "all the buildings, out-houses and premises of said place with the appurtenances" where it appears that the lot in question was wholly occupied by the demised premises and that the outbuildings were upon an adjoining lot also owned by the lessor.²²

§ 274. **Exclusive right of the lessee of hotel to use a particular name.** Where the proprietor of a hotel or boarding house, whether lessee or owner of the building has by close attention to the needs and comforts of his guests, and by his superior industry and skill given his establishment a wide popularity under a distinctive name, and made it under such name a desirable resort for lodgers and travelers he has acquired an exclusive right to and property in such name which equity will protect. In fairness and justice to the person whose labor has given the name value and in order to protect the public from fraud and imposition any other person using such name while conducting a hotel in the same town will be enjoined from continuing to do so.²³ The right to use the name, being a property right, may be transferred. Thus a lessee of a hotel in assigning his term or in subletting may, where he has acquired a right to use a peculiar and distinctive name, transfer such right to his assignee or sub-tenant. Or he may stipulate that he will not carry on the same business in the same place for a specified term of years in which case the right to the exclusive use of the name may pass to and vest in the assignee by implication. A mere assignment of the term will not, in the absence of express language to that effect, confer upon the assignee the right to use the name in which the assignor has property rights with the consent, express or implied, of the latter. And unless the person who by his industry and skill has acquired the exclusive right to use a particular designation for his hotel or boarding house, has transferred it to one to whom he has assigned or sublet the premises with which the designation was connected the latter cannot enjoin him from using it in the same business.²⁴

²² *Morris v. Kettle*, 56 N. J. Eq. 826, 34 Atl. Rep. 376.

²³ *Wilcoxon v. McCray*, 38 N. J. Eq. 466, 469; *Howard v. Henriques*, 3 Sandf. (N. Y.) 725. See

also, *Knott v. Morgan*, 2 Keen. 213, 219.

²⁴ *Wilcoxon v. McCray*, 38 N. J. Eq. 466, 469.

§ 275. The tenants right to light and air coming through his front and rear windows. The abutting owner of land at common law has a right to the street or highway for light and air and for access, ingress and egress, subject only to the easement in the public to use the highway and the rights of the municipality in which his land is situated. These rights constitute particularly in crowded business streets the most valuable portion of his property so that to deprive him of it will in most cases greatly diminish its value.²⁵ These advantages belong to and are a part of the property and are absolutely essential to its full use and enjoyment and they pass to a lessee unless specially reserved to the owner or some other person in the instrument.²⁶ Where an owner lays out land and on the map thereof designates certain streets and roads as giving access to the lots upon the map, and subsequently leases such lots on long leases, the action of the owner in platting the land amounts to a dedication of such streets and roads to the use of the lessees.²⁷ Hence the lessees are absolutely entitled to have these streets and roads kept during the term of the lease²⁸ and also to every incidental right flowing out of the existence of such public streets and highways. The tenant of a

²⁵ *Branahan v. Hotel Co.*, 39 Ohio St. 333; *Brayton v. Fall River*, 113 Mass. 218; *Pratt v. Lewis*, 39 Mich. 7; *Edmison v. Lowry*, 3 S. D. 77, 52 N. W. Rep. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774.

²⁶ *Edmison v. Lowry*, 3 S. D. 77, 84, 52 N. W. Rep. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774; holding also that the depositing of stone and lumber by the landlord in front of the leased premises which resulted in the tenant being deprived of access for three months was an eviction which justified the tenant's refusal to pay rent.

²⁷ *Thousand Island Park Association v. Tucker*, 173 N. Y. 203, 65 N. E. Rep. 975; reversing 69 N. Y. Supp. 1149.

²⁸ The right of the abutting owner in land of a street is a peculiar, distinct and separate right

from that of the general public. It includes not only the right to use the street for passage but for light and air, access, ingress and egress at all times subject to the public easement. The right to an unobstructed street constitutes the most valuable part of the property, particularly in crowded thoroughfares and business streets. Such rights constitute property and cannot be taken for public use without just compensation. These rights of the owner of abutting property pass to a lessee, and the lessee therefore acquires all right to use the street in front of his premises, including the right to air and light, access, ingress and egress incident to the property not only as against the public but against the lessor as well. Hence the right of the lessee to the use of the street for the approach of

portion of floor in a building whose windows open upon the street or highway has the same right to the light and air which pass through these windows as against his landlord as the tenant of the whole building would have. Thus a lease of several front rooms on an upper floor of a building carries with it the implied right as against the landlord to have an unobstructed view of the street. So the lessor cannot shut off such view or impair the tenant's easements of light and air by adding to the front of the building.²⁹ One who leases the whole building and sublets the several floors to separate tenants owes each of them the duty of refraining from obstructing their several easements of light and air. His liability to his subtenants in this respect is precisely the same in extent and degree as is that of the owner of the fee. The right of a tenant whether of the whole building or of only one floor to light and air coming through the rear windows of his premises will be protected to the same extent is in the case of front windows. So, in a case where, during the term of a lease of a second story apartment in a building whose rear abutted upon a yard, the landlord, without the consent of the tenant, erected an extension of the building which occupied the yard so as to cut off the tenant's light and air it was held that a mandatory injunction would issue to compel the landlord to remove so much at least of the extension as obstructed the tenant's light and air by being in front of or above the rear windows of the tenant.³⁰ Though it is the well established rule that where premises are leased with windows opening upon a vacant lot detached from the premises a grant of light and air is not implied to the lessee, yet where a lease is made of a part of a building with a window opening into a yard connected with building so that if the lessee had leased the whole building the yard would have passed as an appurtenant to the demised building, the lessee acquires a right to have the window left unobstructed at least when it is necessary for the use of the premises for the purpose for which it was let.³¹ As between the several tenants of a building which

express wagons, carriages and other vehicles is as full and complete as his right to the occupation and use of the demised building itself, and his right to the one can no more be lawfully

obstructed than the other. *Edmison v. Lowry*, 3 S. D. 77, 84.

²⁹ *Brande v. Grace*, 154 Mass. 210, 31 N. E. Rep. 633.

³⁰ *Stevens v. Salamon*, 31 Misc. Rep. 19, 79 N. Y. Supp. 136.

³¹ *Doyle v. Lloyd*, 64 N. Y. 432,

is let out in separate apartments each has, as against all the others, an unlimited right to the light and air necessary to make his apartments habitable and which he receives through the front and rear windows in existence when he takes the premises. The

436, 439. In this case the Court by Earl, J., said: "If the plaintiffs had hired the whole building with the appurtenances, their right to the yard could not have been questioned. The yard belonged to the building and was appropriate to its use, and would pass under a lease of the premises demised. The lease would have such effect, because it would be the presumed intention of the parties. In *Sheppard's Touchstone*, 94, it is said that the grant of a messuage or a messuage with the appurtenances will pass the dwelling house, barn, adjoining buildings, orchard, curtilage, and garden. In *Comyn's Digest* (Title, Grant E 6) it is said, 'by the grant of a messuage or house, the garden, orchard, or curtilage pass.' In *Whitney v. Olney*, 3 Mason (U. S.) 208, it was held that a devise of a mill with appurtenances conveyed not the buildings merely, but the land under and adjoining, which is necessary to the use and actually used with it. In *United States v. Appleton*, 1 Sumn. (U. S.) 492, Judge Story said, "The general rule of law is, that where a house or store is conveyed by the owner thereof everything then belonging to and in use for the house or store, as an incident or appurtenant, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner and with the same beneficial rights as were then in and be-

longed to it. In the case supposed, the yard would have passed with the store, not by force of the word "appurtenances" but as portions of the premises demised. *Riddle v. Litchfield*, 53 N. H. 503. If all the rooms, in the building had at the same time been rented to different persons, each taking the room with the appurtenances, and no mention had been made of the yard, a different case would have been presented. The demise of a room in the building would pass no portion of the yard. Each tenant would take only the room which he had hired, and would take no other portion of the premises. Whatever else he took would be by virtue of the word "appurtenances." That word would give him whatever was attached to or used with the premises, or incident thereto and convenient or essential to the beneficial use and enjoyment thereof, and he would take any easement or servitude used or enjoyed with the demised premises. 2 Wash. on Seal Prop. 667. It would give him no interest in the yard as a portion of land, because land cannot pass as appurtenant to land, but it would give him easement in the yard in common with all the other tenants, for all purposes for which it could be used in common—for access to the privies, for a playground for children, and for light and air for rooms in the rear of the building. If the different rooms were leased at different times with the appurtenances, the

same rule applies to all windows in the separate apartments opening on any passageway which is wholly within the building itself, as a hall or corridor. A tenant of one portion of the premises whose full and unobstructed use of a front or rear window is prevented by or through tenants of other parts of the house, placing showcases in front of it, may maintain an action of trespass against the trespasser, and may legally remove the obstructions themselves.³² If the tenant of one part of the premises obstructs the windows of another tenant by the direction or with the express consent of the landlord the tenant who is thus annoyed or inconvenienced may treat the obstruction as a constructive eviction and he may act accordingly so far as the abandonment of his apartments is concerned. An owner of premises leased the upper part of the same the windows of which looked out upon an open space. He then leased the whole building subject of course to the prior lease, but also giving the second lessor permission to erect an electric plant and to build a chimney for the same. The second lessee having erected a chimney which obscured the windows through which the first lessee received light and air it was held that the first lessee had a right of action against the landlord though the lease contained no express covenant of quiet enjoyment.³³ A covenant by the lessor that he will not object to any "works" on the adjoining premises which may be sanctioned by his landlord, applies only to buildings which are in actual contact with the demised building. Hence the tenant is not precluded from preventing his landlord from building so as to obstruct his light, where his lease conveyed to him all lights, easements and appurtenances belonging to the premises which he leased, where

same result would follow. Each tenant would have an easement in the yard. Such, in the absence of restrictive words, would be the manifest intention of the parties and no rule of law stands in the way of giving effect to such intention. The yard was attached to and appropriated for the use of the building. The privies were built for the use of the occupants of the building and the yard was essential to the beneficial use thereof, and as the building was

occupied when plaintiff took the lease no tenant thereof could well dispense with the use of the yard. The building was so constructed and arranged that all the tenants had access to the yard and there was no other apparent purpose to which the yard could be subjected."

³² *Whitehouse v. Aiken* (Mass. 1906) 77 N. E. Rep. 499.

³³ *Case v. Minot*, 158 Mass. 557, 33 N. E. Rep. 700

the buildings which are being erected by the landlord are located on ground which actually touches the ground occupied by the tenant.³⁴

§ 276. Rights as to the use of light and air as between the proprietors of adjoining premises. In England it is the general rule that a person may acquire the right to an easement of light and air as against an adjoining owner by the uninterrupted enjoyment of such right for a period of twenty years. By such right the adjoining owner is prevented from stopping up the windows of the person who has the right by the erection of buildings on his own land. So if one who has a house with windows looking out to his own vacant land shall sell it he may not thereafter build a structure upon the vacancy which he still owns which shall deprive the house he has sold of its light.³⁵ This rule for a prescriptive right or easement however, in the use of light and air which may be acquired by uninterrupted use is not generally recognized in the United States.³⁶ In the cases cited the question of an easement of light and air over adjoining land has almost universally arisen between the grantor of the fee and his grantee, and no English case has been found where the rule was applied between a lessee and a lessor who was the owner of adjoining land. The basis of the rule which is recognized in England is not very clearly pointed out in the cases. As between the grantor and grantee the rule may in theory be based on an im-

³⁴ White v. Harrow, 86 L. T. 4, 50 W. R. 259.

³⁵ Moore v. Rawson, 3 Bar. & C. 332, 340; Palmer v. Fletcher, 1 Lev. 132; Aldred's Case, 9 Rep. 58b. For a full citation of the English cases see Washburn on Easements and Servitudes, mar. p. 492. *et seq.*

³⁶ Ward v. Noel, 37 Ala. 500; Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. Rep. 192; Lapere v. Luckey, 23 Kan. 534, 33 Am. Rep. 196; Richardson v. Pond, 81 Mass. 387, 389; Carrig v. Dee, 14 Gray (Mass.) 583; Hayden v. Dutcher, 31 N. J. Eq. 217; Sweeney v. St. John, 28 Hun (N. Y.) 634; Mul-

len v. Stricker, 19 Ohio State, 135, 2 Am. Rep. 379; Haverstick v. Sipe, 33 Pa. St. 368; McDonald v. Bromley, 6 Phila. (Pa.) 302, 24 Leg. Int. 157; King v. Large, 7 Phila. (Pa.) 282, 27 Leg. Int. 149; Klein v. Gehrung, 25 Tex. 232; Hubbard v. Town, 33 Vt. 283; Turner v. Thompson, 58 Ga. 268, 24 Am. Rep. 497; Guest v. Reynolds, 68 Ill. 478, 18 Am. Rep. 570; Dexter v. Tree, 117 Ill. 532, 6 N. E. Rep. 506; Stein v. Hauck, 56 Ind. 65, 26 Am. Rep. 10; Cherry v. Stein, 11 Md. 1; Parker v. Foote, 19 Wend. (N. Y.) 309; Powell v. Simms, 5 W. Va. 1, 13 Am. Rep. 629.

plication that the premises to which it is claimed the easements attached would be rendered more valuable thereby, and that for that reason the grantee of the premises paid more for them than he would otherwise have done. As between grantor and grantee it may possibly be assumed that the easement arises as soon as the grant is made. If this be assumed then the easement is not created by prescription nor by adverse use for a specific period which might apply in other cases, but by the fiction of an implied contract.³⁷ No doubt the English cases determining this question between a grantor and grantee would be applicable in those jurisdictions where the English rule is followed to a case where a lessor owning adjacent lots by building upon one of them obstructs the light and air of his lessee. The prevalent rule in the United States is that an easement in the unobstructed passage of light and air cannot be acquired by prescription alone.³⁸ And it is also a general rule to which, however, exceptions are made in some states that a grant of the right to light and air will not be created by implication from the conveyance of a house whose windows overlook other land retained by the grantor. Nor will a grant of an easement of light and air be implied in such case from the nature or use of the building on the land conveyed or from the necessity of such an easement to the convenient use and enjoyment of the property.³⁹ So, a person who rents the second story of a building for a business *i. e.*, photography which requires unobstructed light, has no cause of action against an owner of an

³⁷ Mr. Washburn in his Treatise on Easements bases the claim to light and air upon what he calls the familiar rule of law that if one grant an estate to which certain apparent and continuous subjects of enjoyment belong and are used therewith he cannot thereafter derogate from the benefit of his own grant by interfering therewith.—p. 492.

³⁸ Keating v. Springer, 146 Ill. 481, 492, 34 N. E. Rep. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544; Keats v. Hugo, 115 Mass. 204; Mullen v. Stricker, 19 Ohio St. 135; Guest v. Reynolds, 68 Ill. 478

³⁹ Robinson v. Clapp, 65 Conn.

365, 33 Atl. Rep. 390, 29 L. R. A. 582; Keiper v. Klein, 51 Ind. 316; Morrison v. Marquardt, 24 Iowa, 35, 92 Am. Dec. 444; White v. Bradley, 66 Me. 254; Collier v. Pierce, 7 Gray (Mass.) 18, 66 Am. Dec. 453; Randall v. Sanderson, 111 Mass. 114; Keats v. Hugo, 115 Mass. 204; Burr v. Mills, 21 Wend. (N. Y.) 290; Shipman v. Beers, 2 Abb. N. C. 435; Haverstick v. Sipe, 33 Pa. St. 368; *contra* James v. Jenkins, 34 Md. 1, 6 Am. Rep. 300; Turner v. Thompson, 58 Ga. 268, 24 Am. Rep. 497; Taylor v. Boulware, 35 La. Ann. 469; Cherry v. Stein, 11 Md. 1; Green v. Meter, 54 N. J. Eq. 270.

adjacent lot who subsequently erects a building thereon and obstructs the tenants' windows though the same person owned the demised premises and the strip of land upon which the wall was located.⁴⁰ It follows therefore in conformity with this general rule that a landlord will not be liable for obstructing his tenant's light and air by building on the adjoining land owned by him in the absence of any covenant or agreement in the lease forbidding it.⁴¹ Of course the right to have light and air come through a window over the adjoining premises may be conveyed in a lease by express covenant or agreement.^{41a} So, if buildings are erected occupying the four sides of an open court, or occupying three sides of a court or alleyway which opens into a public highway with an open space in the middle for light and air which is free to the occupants of the rooms in the adjoining buildings, with a

⁴⁰ *Lindsey v. First Nat. Bank*, 115 N. Car. 553, 20 S. E. Rep. 621, in which the court said: "Whether the plaintiffs leased the second story room for the purpose of taking photographs therein, or with some other object in view, they contracted in terms only for the use of the apartments occupied by them, and not for an unobstructed light passing through a certain window or windows in addition. They might maintain an action for any trespass upon the premises rented by them. But conceding that the lessors were the owners of the eighteen inches of land just outside the wall which was in dispute, it was not contended that they had entered into any stipulations, so far as we can ascertain from the testimony, that the lease of the plaintiffs should extend beyond the wall. Consequently the lessors could have purchased the land of the coterminous proprietor and have erected a structure, one wall of which would have shut out the light from the windows of the demised premises, without subject-

ing themselves to liability on an action of trespass brought by their tenants. They could have conveyed to another this narrow strip of land and have vested their grantee with the same power, their lessee having acquired in the absence of special stipulation no right, title or interest in it. Whether the lessors allowed the adjacent owner to build a wall upon it under a verbal license or left him unmolested when he built without license or not the lessees had no remedy against the latter in any event, and could maintain an action against the former only by showing a breach of some special contract in reference to the lights.

⁴¹ *Keating v. Springer*, 146 Ill. 481, 493, 34 N. E. Rep. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544; *Myers v. Gemmell*, 10 Barb. (N. Y.) 537, 545; *Palmer v. Wetmore*, 2 Sandf. (N. Y.) 316, 2 Woodf. Landlord & Ten., p. 703, note.

^{41a} *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662, 667; *Brooks v. Reynolds*, 106 Mass. 31; *Hazlett v. Powell*, 30 Pa. St. 293.

common entrance to all, and separate apartments are then let out to different tenants, the owner may conclusively be considered to have dedicated that open space, like a yard, for the benefit of his tenants.⁴²

§ 277. **The right of a tenant to use outside walls.** One who leases business property takes by implication in the absence of an express reservation in the lease the right to use the outside wall or walls for placing his signs or other advertising matter thereon,⁴³ unless it appears that the walls of the portion of the premises leased, were already occupied by signs to such an extent as to be notice to the tenant, that his advertising privilege was to be restricted.⁴⁴ This right passes as an incident of the leasing being necessary to the full and proper enjoyment of the demised premises. Hence as against the tenant in possession the landlord cannot lease the right to use the outside walls to a third person,⁴⁵ and if he shall attempt to do so, the third person may be enjoined from placing signs or notices thereon without the consent of the tenant.⁴⁶ The tenant however has no right to use for any purpose any portion of the outside wall not enclosing his part of the premises. The tenant of a store on the ground floor cannot interfere with the landlord who lets the wall of an upper story to another.⁴⁷ The question of the right to use an outside wall as space for signs and advertisements may arise and cause some difficulty where several tenants occupy separate premises on the same floor. A provision in a lease to the effect that "the

⁴² *Myers v. Gemmell*, 10 Barb. (N. Y.) 537, p. 546, citing *Story v. Odin*, 12 Mass. 157, in which case houses facing on three sides of a court were sold.

⁴³ *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388; *Baldwin v. Morgan*, 43 Hun (N. Y.) 355; *Law v. Haley*, 9 Ohio Dec. 785, 17 Wkly. Law Bul. 242; *Carlisle Cafe Co. v. Muse*, 67 L. J. Ch. 53, 77 L. T. (N. S.) 515.

⁴⁴ *Scott v. Fox Optical Co.*, 38 Pitts. L. J. 368. But see *Hele v. Stewart*, 19 W. N. C. (Pa.) 129.

⁴⁵ *Lowell v. Strahan*, 145 Mass. 1, 12 N. E. Rep. 401.

⁴⁶ *Baldwin v. Morgan*, 43 Hun

(N. Y.) 355. A lessee of the first story and basement of a building will be protected against his lessor by an injunction, where he has painted on the outer wall of his story, in good style, certain pictures, signs, and devices, suitable and proper for advertising his business, where the signs do not extend beyond the premises leased to him, and the lease contains no restriction upon putting signs on the front of the building. *Baldwin v. Morgan*, 43 Hun (N. Y.) 355.

⁴⁷ *Booth v. Gaither*, 58 Ill. App. 263. And may be restrained from doing so by an injunction.

lessee may have the right to place signs upon the outer walls" does not where there are several tenants give him an exclusive right to do so but is to be construed in reference to the condition of the premises at the time it was written especially as affected by licenses to older tenants.⁴⁸ But where a building is let out in floors to separate lessees each one has the exclusive right to place signs upon the outer wall so far as it forms an enclosure to his premises.⁴⁹ The right of a tenant in a large business building

⁴⁸ *Pevey v. Skinner*, 116 Mass. 129.

⁴⁹ *Lowell v. Strahan*, 145 Mass. 1, 12 N. E. Rep. 401, 1 Am. St. Rep. 422; *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388; *Law v. Haley*, 9 Ohio Dec. 785, 17 Wkly. Law Bul. 242; see, also, *Snyder v. Hersberg*, 33 Leg. Int. 158. A tenant will not be enjoined pending an action, by his landlord to compel him to remove a sign on his premises, where the sign is not forbidden by the lease, and it does not appear that it caused irreparable injury to the landlord. *Stirn v. Nash*, 19 Civ. Pro. R. (N. Y.) 184, 12 N. Y. Supp. 431. Now, it will hardly be contended that the outside wall of a store or house is not essential for the reasonable and proper enjoyment of the interior of the building. The outer side of the wall is but one side of the same wall that has an inner side; the removal of the wall removes both sides. If, then, a lessee or grantee may have the wall which he pays for, it would seem that he should be entitled to the use of it. Not only for purposes indispensable to the occupation of the building, but also for any purpose of service or profit not inconsistent with the lawful and reasonable enjoyment of the property. If he uses the tenement for

a store, he would ordinarily be entitled to affix his signs to the outer wall; an awning also if such appendage should be deemed necessary or convenient. He may suspend his wares upon the building if no one is inconvenienced thereby and he may cover the outer walls with his advertisements of the merchandise which he keeps for sale within, if he does not injure the building, nor obstruct the public passage, nor offend the public eye and taste by unseemly exhibitions or otherwise violate the laws. And if he may thus incumber and cover the exterior walls of his store, clearly his lessor cannot do the same thing at the same time. The occupation by both parties to the lease for incongruous purposes is impossible. If the premises are leased for a clothing store, for example, the lessor cannot use for a bulletin board the space which the lessee may reasonably, properly, conveniently and profitably occupy with the ready-made garments which he thereby suspends for exhibition and sale. * * *

The lessee who affixes his signs and advertisements upon the wall, or thereupon suspends his wares, does so in order to attract custom, and thereby increase the profit derived from the use of the demised premises. The outer wall

which is rented to many tenants carrying on various trades or avocations, to have his sign stating his name and the nature of his business displayed in a prominent place at the entrance from the street is an important one. The matter is usually regulated either by the terms of the lease or by regulations made by the landlord for the management of the property to which the tenant is required to conform. Where the matter is not thus expressly regulated the right to have a sign at the common entrance to this building will pass as an appurtenance to the premises demised. A tenant cannot however arbitrarily place his sign in a particular locality at the entrance as against older tenants. Nor will equity protect him from having his sign removed to another place unless it shall appear that he has exhausted all means within his reach to come to an arrangement with the landlord and the other tenants.⁵⁰ But a tenant of the upper floors of a building to whom has been given the privilege of putting signs on or near the stairway can prevent a tenant of a lower floor from covering up his signs, whether by reason of his tenancy or by authority from the landlord.⁵¹ Tenants who, by the terms of the lease, are not permitted to use the outside walls of the premises for advertising purposes cannot prevent the use of such walls by their

is to him a source of legitimate profit. And as the lessor does not ordinarily prescribe the uses to which the interior of the store shall be devoted—provided only the use be not offensive, improper or illegal so he may not, otherwise than with the same proviso, prescribe the uses to which the outer walls may be devoted by his lessee. If the lessee deems it more advantageous to employ the walls for advertising the goods or business of others receiving payment therefor, than to advertise or expose his own goods, upon the wall, it is none of the landlord's business, unless he has restricted and forbidden such use of the premises, or inserted in his lease a covenant against the letting of them. It would be singular if a landlord, who had leased a build-

ing for the purposes of trade might occupy the outer walls of the same building for displaying the advertisements of a rival trade but this result might very probably follow, if the lessee might not control the use of the exterior walls. *Riddle v. Littlefield*, 53 N. H. 503, 510.

⁵⁰ *Knoepfel v. Kings County Fire Ins. Co.*, 66 N. Y. 639, 48 How. Prac. (N. Y.) 208, 7 J. & S. 553, and compare *Law v. Haley*, 17 Wkly. Law Bul. 242, where a prior tenant having appropriated a space for his sign an injunction was refused a subsequent tenant to prevent him from continuing to occupy it.

⁵¹ *Miller v. Fitzgerald Dry Goods Co.*, 62 Neb. 270, 86 N. W. Rep. 1078.

landlord for advertising purposes on the ground that the advertisements painted by the landlord upon the outside walls offend their esthetic tastes and dim the lustre of the advertising signs of the tenants which they have caused to be placed upon their windows. They must show some actual damage and injury to their business.⁵² A sign which has for some years been attached to premises owned by the landlord other than that demised but adjacent to it, and which indicated the locality of the demised premises, and the business of its occupant, the lessee, will be presumed to be a parcel of the said premises, and the landlord will be enjoined from removing it.⁵³

§ 278. **The use of roof for advertising purposes.** The very common use of roofs for the display of large advertising signs render some consideration of this topic necessary so far as it relates to the relation of landlord and tenant. Under a lease by which the tenant receives the exclusive possession and control of the demised premises he would doubtless have the right to sublet the roof for advertising purpose unless expressly forbidden to do so by a provision in the lease. In doing so he may be liable to his landlord for any injury to the building resulting from the erection of signs on the roof irrespective of whether such damage was or was not the outcome of negligence. He may be liable for his failure to restore the premises to their original condition after the structure placed upon the roof for advertising purposes is removed. The landlord who retains to himself the exclusive control of the roof, particularly of premises leased to several tenants in floors may lease the roof to a stranger or use it for his own advertising purposes, unless forbidden to do so by the lease. His liability to his tenants to keep the roof in a reasonable state of repairs will extend to and include any signs or other structures placed on his roof by himself or others with his permission.

§ 279. **Tenant's right to show windows.** The display and public exhibition of goods exposed for sale in stores constitute a very important part of the use and enjoyment of business premises. Where, at the time of the letting, there are show windows in a store, they are included as an appurtenance of the premises, and the tenant has the full right to use them for the display of his

⁵² Fuller v. Rose, 110 Mo. App. 344, 85 S. W. Rep. 931.

⁵³ Francis v. Hayward, 52 L. J. Ch. 291, 22 Ch. D. 177, 48 L. T. 297, 31 W. R. 488, 47 J. P. 517.

goods.⁵⁴ The extent of the tenant's right to make a display of merchandise sold by him depends altogether upon the language of the lease and the facts of each case. His rights are obviously greater in the case of business premises than in the case of a dwelling house. But even though he may have an absolute right to use show windows existing in the premises at the date of the lease he will not be permitted to put in new windows for exhibiting his wares without the consent of his landlord. Such conduct on his part, effecting a material alteration in the premises, is waste from the landlord's standpoint and will be enjoined as such in equity. And his use of existing show windows must be a proper and legal use for if he shall, by exhibiting anything therein during his term, create a nuisance which shall tend to injure the reversion he may be enjoined by his landlord.

§ 280. **Easements of egress and ingress.** A demise of land in general terms without any express mention of the use of a right of access thereto conveys the right to use all ways giving access to the premises which are appurtenant to the land or which are necessary for its convenient use by the tenant. If the right of way is in fact appurtenant it has passed with the general demise whether the word appurtenant is or is not used.⁵⁵ Whether a right of way is or is not an appurtenance depends mainly upon the determination of the question whether it has or has not been used by the former tenants or has been enjoyed by them in connection with their use of the building demised. This is always a very material inquiry irrespective of whether the word appurtenance is employed in the lease or not. A right of way to the demised premises not strictly appurtenant will not pass under a clause leasing the premises "with all roads, ways, rights of road, paths, passages, etc., to the premises, or in any way appertaining" unless the parties to the lease appear to have intended to use these words in a sense which is larger and more inclusive than their ordinary sense.^{55a} The better practice

⁵⁴ *Herpolsheimer v. Funke* (Neb.) 95 N. W. Rep. 688.

⁵⁵ *Skull v. Glenister*, 11 W. R. 368; *Snook & Austin Fur. Co. v. Steiner*, 113 Ga. 363, 43 S. E. Rep. 775, 777; *Patterson v. Graham*, 140 Ill. 531, 30 N. E. Rep. 460; *Seidel v. Bloesser*, 77 Mo. App.

172; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (unof.) 340, 96 N. W. Rep. 487; *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Dec. 629.

^{55a} *Barlow v. Rhodes*, 1 C. & M. 439. See, also, *Hinchcliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1.

in conveying the right to use roads, ways or passages to a tenant to whom lands or buildings are leased is to describe the roads or ways which are meant to be transferred "as having been used by the former tenants" or as "having been enjoyed" in connection with the possession of the premises.⁵⁶ For a lease of premises "together with all ways appertaining or that in any parts thereof are used or enjoyed," carries a right of way, though it is not expressly mentioned in the lease if it were used with the premises at the time the lease was made.⁵⁷ The absence of the word appurtenances is not material, though its presence strengthens the construction. A lease of a house with all the rights "belonging or appertaining or therewith usually held, used, occupied, or enjoyed and their appurtenances" embraced and conveyed a right of way which had been held with the principal estate.⁵⁸ So, where premises were let with certain specified rights of ingress and "all other ways and easements to the said premises belonging and appertaining," the latter words were held to pass a right of way over the lessor's own premises, which he used for access to the premises demised.⁵⁹ The right to use a certain way to gain access to the demised premises may, under certain circumstances, pass to the lessee, though it is not strictly an appurtenant and though it has never been used or enjoyed by any former tenant of the premises. For example, where a landowner demised a portion of his land which he cuts out of a

⁵⁶ *Morris v. Edington*, 3 Taunt. 24, 27; *Barlow v. Rhodes*, 1 C. & M. 439; *Harding v. Wilson*, 2 B. & C. 96. Under these words any right of way used and enjoyed by the tenant when the lease was executed would pass. The rule that no easement can exist in land in which there is a unity of possession has an exception where a lessor having used convenient ways over his own adjoining land leases land with all ways appurtenant. The convenient ways used by him over his own land will pass to his lessee though technically speaking they are not appurtenant unless it be shown that there was a way appurtenant.

The court said there is a great difference to be observed in construing a grant or lease with easements over another's land and one where the easements are in the lessor's land. *Morris v. Edington*, 3 Taunt. 24, 31.

⁵⁷ *Kooystra v. Lucas*, 1 D. & R. 506, 5 B. & Ald. 830, 24 R. R. 575; *Harding v. Wilson*, 3 D. & R. 287, 2 B. & C. 96, 1 L. J. (O. S.) K. B. 238, 26 R. R. 287; *Morris v. Edington*, 3 Taunt. 24, 12 R. R. 579; *Crisp v. Price*, 5 Taunt. 548.

⁵⁸ *James v. Plant*, 4 Ad. & El. 749.

⁵⁹ *Morris v. Edington*, 3 Taunt. 24, 12 R. R. 579

large tract so that the demised land is surrounded by other land of the lessor occupied by the lessor or by other tenants, there arises by implication in the tenant of the inner portion of the land a right of way by implication of law and by necessity, over the adjoining land owned by the landlord. But aside from rights of way which are in fact appurtenant to the land demised or which arise from necessity, no easement of access over other lands is conveyed to a tenant by a general demise of land or of a building. In other words, rights of access to the demised premises cannot be claimed by a tenant merely because his convenience will be advanced thereby, in the absence of an express grant. Hence, as a rule the lessee of land which is accessible from the public road has no right to use a shorter way across other lands of his lessor without the permission of the lessor, either express or implied; and if this permission can be implied from his use of the shorter route without objection, it is only a parol license and revocable at the pleasure of the lessor.⁶⁰ So, also, the lessee of a part of a building cannot claim a right of access to his premises through a portion leased to another, where such access is not granted in the written lease, and there are other means of access to the leased premises, merely because this method of access would be more convenient for him. If the access through the other portion of the premises were an easement which attached to his use of his premises, or if it were the only means of access to the portion of the building occupied by the tenant before his term it might be claimed by him as necessarily appurtenant to his premises. The case is very different where its use is a mere convenience to him, but a serious injury to the rental value of other portions of the house.⁶¹ The tenant in taking a lease of land, must inquire and ascertain for himself the means of access. The mere silence of the landlord as to the existence or non-existence of a road by which access to the land may be had, is not fraud. If the lessor asserts that there is a road by which access to the premises may be had, it is fraud on his part if the assertion is false. The lessee will not be justified in assuming that there is an established road to the premises, because there may be signs of travel. He must look to it himself, and, if he shall lease a tract of land to which there is no access,

⁶⁰ *Motes v. Bates*, 4 Ala. 374.

⁶¹ *Ward & Co. v. Robertson*, 77 Iowa, 159, 161.

the lessor's subsequent promise to build a road is not supported by the consideration that, without the road, the lessee will not be able to pay his rent. The mere fact that the lessee, relying upon the promise of the lessor to build a road, omitted to do so himself, and thereby failed to get his crops in season, is not such a disadvantage as would constitute a consideration for a promise by the lessor. To have that effect, it must appear that the disadvantage was suffered at the request of the promisor, expressed or implied.⁶² But a covenant in the lease by the lessor that he will build a road or provide access where none exists is valid and enforceable by the tenant. A covenant by the lessor that he "will provide a suitable right of way to get to and from" the premises which are surrounded on all sides by land of others than the lessor is not a mere warranty that there existed a right of way by necessity over the land of others. It is therefore not performed by showing that such a mode of access exists and evidence to that effect is therefore inadmissible. The covenantor agrees to do something for the lessee. He must by purchase or otherwise secure a right of way over the land of adjacent proprietors and if he fails to do this he is liable to the lessee for what the latter has had to pay to owners of other land for a suitable right of way over it.⁶³

§ 281. **Tenant's right to use of stairways and halls.** A landlord who lets rooms, apartments or offices on the upper floor of a dwelling house or other building, covenants by implication, that the lessee shall have a free and uninterrupted use of the stairway, halls and entrances, both for himself and his visitors. The right of the lessee under such circumstances is in the nature of an easement, to the use of the entry-way, hall and stairways leading to the floor or apartments occupied by him.⁶⁴ Thus, in

⁶² Handrahan v. O'Regan, 45 Iowa, 298, 300.

⁶³ Bunker v. Pines, 86 Me. 138, 140, 29 Atl. Rep. 959. A means of access through the demised premises to other property of the lessor, which had always been used by tenants of such other property, does not pass by a demise of a tenement "now of late in the occupation of A," where it was

not shown that the passage way had been in the exclusive occupation of A. Dyne v. Nutley, 14 C. B. 122, 2 C. L. R. 81.

⁶⁴ Weil v. Munro, 3 N. Y. Supp. 25; Miller v. Fitzgerald Dry Goods Co., 62 Neb. 270, 86 N. W. Rep. 1078; Chase v. Hall, 41 Mo. App. 15; Cowan v. Truefitt, 67 L. J. Ch. 695, 2 Ch. 551, 79 L. J. (N. S.) 348, 47 Wkl. Rep. 29.

an English case, it was held that a tenant who rented two rooms on the second floor, had an absolute right to the use of the door bell, the knocker, a skylight which lighted the stairway, the stairway itself, a closet in the hallway and of all other conveniences in the building necessary to the proper and comfortable enjoyment of the part leased by him.⁶⁵ An action by the tenant will lie against the landlord either in damages for removing such conveniences or in equity for an injunction to restrain the landlord from interfering with them.⁶⁶ So, too, the tenant of a lower floor cannot, either under his lease or by the direction and authority of the lessor, obstruct the stairways or halls, or the means of access thereto, so as to prevent or impede access to the rooms of a tenant on an upper floor,⁶⁷ for if there are several tenants in the building, entrance to which is through a single door and hallway, the right of all and any of them to use the premises is subject to the right of all the others to make an equal use of the common entrance and no one of them has an exclusive right to such use.⁶⁸ For it is well settled that the right of a tenant to use an exit or egress to and from the portion of the premises occupied by him, whether for himself, his visitors or his goods, must be used so as not to inconvenience the other tenants unnecessarily.⁶⁹ The right to use closets contiguous to rooms rented in an office building and the wash basins therein and the elevators, hallways, stairs and entrances to the building are included in the lease, even though they are not specially mentioned.⁷⁰ Nor can the landlord by reason of an express covenant permitting him to alter or repair the stairway, so materially alter its location that the access of the tenant of the upper floor is materially affected. And, if by altering the entrance

⁶⁵ Underwood v. Burrows, 7 Car. & P. 26.

⁶⁶ Miller v. Fitzgerald Dry Goods Co., 62 Neb. 270, 86 N. W. Rep. 1078.

⁶⁷ Miller v. Fitzgerald Dry Goods Co., 62 Neb. 270, 86 N. W. Rep. 1078.

⁶⁸ Perry v. Skinner, 116 Mass. 129.

⁶⁹ Browning v. Dalesme, 5 N. Y. Super. Ct. 13, 195.

⁷⁰ Hall v. Irwin, 78 App. Div. 107, 79 N. Y. Supp. 614, reversing

68 Misc. Rep. 123, 77 N. Y. Supp.

91. In Hamilton v. Graybill, 19 Misc. Rep. 521, 43 N. Y. Supp. 1079, the right of a tenant to use a water closet on his floor was decided, and it was said that the existence of the closet "may have been materially persuasive upon the respondent when he accepted the lease of the rooms, and which because not expressly excluded passed with the demise, although not particularly alluded to."

and hallway the landlord gains a larger hallway, he cannot obstruct it, if by so doing, he deprives his tenant of the convenient access that he had before.⁷¹ While the tenant is entitled to the free use of all exits and means of going upon the demised premises which exist when he takes the lease, he may not be entitled to the benefit of doorways and entrances created by the landlord subsequently thereto and which are not absolutely necessary to him for the proper enjoyment of the demised premises. Thus, where a doorway was cut by the landlord which leads into the demised premises (a saloon) from a hotel adjacent, after the lease had been made and the lease contained no covenant concerning the use of such doorway, the landlord is not necessarily bound to keep it open for the benefit of the tenant and its use by the tenant, when permitted by the landlord, may be revoked by him at any time.⁷² Thus, to sum up, the rule is that the tenant is entitled to access to his premises and if he has this, he cannot extend it beyond what he had when he entered into possession. Nor, on the other hand, has the landlord a right to curtail the means of access which existed when the term began. One who rents a lower floor knowing that the upper stories are to be used for purposes which render the use of a stairs and elevator necessary, takes his apartments subject to the right of the tenant upstairs to use the stairway and elevator and to have access to the same through a hall on the lower floor.⁷³ As between the tenants of upper and lower floors it is obviously out of the nature of things that the latter must in very many cases submit to inconvenience in the use and enjoyment of his premises in order that the former may have proper and convenient access to his premises. This should be reduced to a minimum and while the tenant of the upper floor must use the means of access on the the lower floor so as to inconvenience the lower tenant as little as possible, the latter must not obstruct such means of access. As against his landlord a tenant has an absolute right to access where the only means of access to the second story of the build-

⁷¹ Lindblom v. Berkman, 43 Wash. 356, 86 Pac. Rep. 567. The stairway being the only means of egress passed to the tenants of the upper floors as an appurtenance. The fact that the landlord increases the size of the stairway

or hallway gives him no right to impede it.

⁷² Shaft v. Carey, 107 Wis. 273, 83 N. W. Rep. 288.

⁷³ Benedict v. Barling, 79 Wis. 551, 48 N. W. Rep. 670.

ing was a temporary stairway which was partially built over a stranger's property. The tenant on the removal of this stairway has a right to construct another on the premises of the landlord, though by doing so he may injure the occupant of a lower story. On the other hand, the landlord under such circumstances is entitled to have his convenience and interest taken into account in the selection of the mode of constructing the new stairway, and the place where it shall be put.⁷⁴ Generally an express stipulation for access to an upper floor will be construed liberally in favor of the tenant. A provision in a lease of upper rooms in two adjoining houses that the tenant shall have free and unobstructed use of a stairway in one of them will permit him to use a stairway in the other house, which is the only means of access to both his apartments.⁷⁵ The tenant's use of the stairs and entryways must be reasonable. He can use them for exit and egress not only for himself and family, but for his guests and business callers. He cannot use them for storage purposes nor as a loitering place to indulge in social intercourse. The right of a tenant to the use of a hallway or alley to gain admittance to the premises for ordinary housekeeping purposes, does not permit him to use the same as an entrance to a gymnasium connected with a boys' school. Nor can he use the common means of access to his apartments and that of others in such a way as to be objectionable to other tenants without their con-

⁷⁴ *Chase v. Hall*, 41 Mo. App. 15. The lease of rooms in an upper floor includes as an incident everything necessarily used with or reasonably necessary to the use thereof. If there is no access to the upper rooms except through the entryway and stairway an easement in the same for the tenant and for his customers and visitors will be clearly presumed from the circumstances and from the obvious intent of the landlord in constructing the building and leasing it in the way he did. A tenant may not acquire an easement by prescription against his landlord. But a landlord may cre-

ate easements in favor of a tenant, and in case of necessity an easement may be implied. Neither the landlord nor any other tenant either by virtue of the tenancy or by authority of the landlord has any right to obstruct the entry or passageway so as to impede access to rooms occupied by other tenants and any obstructions are nuisances and may be removed. *Miller v. Fitz Gerald Dry Goods Co.*, 62 Neb. 270, 272, 86 N. W. Rep. 1078.

⁷⁵ *Cowen v. Truefitt*, 67 L. J. Ch. 695; (1898) 2 Ch. 551, 79 L. T. 348, 47 W. R. 29.

sent.⁷⁶ The landlord's implied obligation to furnish means of access is confined to the ordinary means as afforded by stairs, hallways and doors suited to the ordinary demands of modern life. The landlord is under no implied obligation to the tenant to furnish him fire-escapes even where the duty is imposed upon him specifically by statutory regulation. The owner of a theatre is not bound to the lessee thereof, to provide it with additional exits for use in case of fire as required by statute where he has only covenanted to keep the premises in ordinary repair or to maintain the property in a suitable condition for use. His failure to do so when requested by the tenant is not a breach of a covenant for quiet enjoyment.⁷⁷ The owner of a building let out in separate offices or lofts for business purposes is by implication bound to afford means of access to and from the several apartments or offices at all reasonable times and under all reasonable circumstances. He would, for example, be bound to keep the front door of the building unlocked during the hours that the several offices or lofts would be in use according to the circumstances of the tenant's occupation. If he knew that a tenant hired offices with an intent to use them during the night as well as during the day, he would be under the necessity of affording him access after dark. But in the case of a building, the offices in which are let mainly to lawyers, the landlord is under no implied obligation to keep the front door open and unlocked during the night or upon a Sunday or a holiday which is *dies non* in the absence of an agreement by him to that effect. His failure to do this does not render him liable to a tenant for damage caused to the property of his tenant by reason of an unusual and unprecedented fire which took place upon a Sunday, because the tenant was not able to remove his personal property through the front door which was closed and locked.⁷⁸

⁷⁶ Gooch v. Furman, 62 Ill. App. 340.

⁷⁷ Taylor v. Finnigan, 189 Mass. 568, 573. 76 N. E. Rep. 203. A lease of the first story, basement and cellar "with the appurtenances" give a lessee the right to use a hatchway, tackle and fall to deposit his goods in the cellar or to hoist them to the second floor, though while they are being thus

used they greatly obstruct access to the premises on the upper floors occupied by other tenants. The tenant on the first floor must not, however, use or keep the hatchway open unnecessarily, but must use it only in good faith to let down or hoist up goods. Browning v. Delasme, 5 N. Y. Super. Ct. 13, 18.

⁷⁸ Whitcomb v. Mason, 102 Md.

§ 282. **The right to use an elevator.** Growing out of the proposition that where a tenant hires a room or a floor in a building the right to use all apparent means of access and exit passes to him as an appurtenant, it may safely be said that in some cases an absolute right to the use of an elevator would be implied in favor of a tenant. It is obvious that in modern buildings of very great height which are leased in separate apartments or offices to separate tenants, the use of the stairway and halls affords a very insufficient and inadequate means of access. In such buildings, as is well known, elevators for freight and passengers are usually installed. If, at the time of the hiring it should happen that there is no elevator in the building, and the tenant hires knowing this fact, it may well be doubted, in the absence of an express agreement, whether the landlord owes any duties to the tenant to install an elevator for his use. On the other hand, if the location of the premises which have been hired is such that access by way of the stairway is extremely inconvenient and particularly if it were the custom in the city where the building is located to have elevators in buildings of the character in question, an agreement might be implied on the

275, 62 Atl. Rep. 749. "The reasonable use of the outer doors, halls and stairways of such a building so located so far at least as related to the lawyers' offices required that they should be kept open and free from improper obstruction during such hours of the day and evening as the tenants and persons having business with them might reasonably be expected to desire access to the offices. But such use did not require that the doors, halls, etc., should be kept in that condition throughout the entire night, nor on Sunday, which is *dies non* when secular avocations are presumed to be suspended. It certainly did not require the outer doors to be kept open on Sunday to such an extent as to admit of the removal by the tenants of large pieces of furniture. The access afforded to the

building on Sunday as shown by the evidence, through the open door and hallway on the ground floor, which connected with the stairway, was in our opinion reasonable and adequate for all ordinary occasions. As illustrating the principles of the text it may be well to cite certain cases where the use of halls and stairways was involved as between owners and not as between landlord and tenant. Thus, we have the case of one building being erected on several lots, each of which lots are owned by separate owners, with one stairway giving access to the building. In such cases each owner would have the right to use the stairway and hall in common which were passed by the conveyance of his lease." *Pierce v. Cleveland*, 133 Pa. St. 189, 19 Atl. Rep. 352.

part of the landlord to install one. But if, on the other hand, there is an elevator in active operation when the office in the building is leased, it will unquestionably be implied that the landlord agrees to maintain it and to permit it to be used, if its use is reasonable and necessary for the beneficial occupancy of the rooms which have been let, and if from the construction of the elevator and of the passageways in the building, it was apparent that the elevator was intended for the general use of the tenants. But, where the elevator is not intended to be used by the occupants of any particular part of the building, the mere fact that it might be convenient for them to use it does not imply any easement in its use where suitable means of access were furnished by the halls, passageways or doors. Where a person became the tenant of a basement which was entered from the street by doors and steps in front of the building and which was separated from the elevator by a solid brick partition so that there was at no time access to the elevator from the basement, the tenant is not entitled to use the elevator for hoisting goods from the basement to the sidewalk and lowering them from the sidewalk to the basement. The fact that while the tenant occupied rooms on an upper floor of the building in addition to occupying the basement, the landlord stipulated in the lease that he might use the elevator to convey his goods to the basement from the upper floor gives him no right to use the elevator after he has ceased to occupy the upper floor.⁷⁹

⁷⁹ *Cummings v. Perry*, 169 Mass. 150, 38 L. R. A. 149, 47 N. E. Rep. 618, in which the court by Field, C. J., says: "It is true that, when a person hires a room in a building, a right to use the apparent means of access and exit often passes as appurtenant to the premises hired. In modern buildings of great height this doctrine we assume may be applied to elevators. Whether an active duty to maintain an elevator for the use of tenants can be implied may be open to question, but if an elevator is in fact maintained by the landlord, the duty to permit ten-

ants to use it, we assume, may be implied if this is reasonably necessary for the beneficial occupation of the rooms let, and if from the construction of the elevator, and of the passageways it is apparent that the elevator was intended for the use of the tenants. But in this case it is apparent that the elevator was not intended originally to be used by the occupants of the basement room, that although it might have been convenient for them to use it in connection with the sidewalk, yet suitable means of ingress and egress had been furnished by the

§ 283. **Electric light as an appurtenant.** Under the rule that whatever is necessary or essential to the proper enjoyment of the term granted to the tenant may be regarded as and will pass as an appurtenant, a landlord, who during the term, has furnished electric lighting for rooms in the building leased by him may be compelled to continue to do so. Undoubtedly he would be compelled to do this upon an express contract to furnish the light where he or his agent in leasing the rooms had informed the lessee, expressly or by implication that the supplying of electricity for illumination was an appurtenance of the premises and would be included in the lease as such, and the incoming lessee made the lease in reliance upon such statement. The tenant's case would be greatly strengthened by the fact that the character of the business of the lessee was known to the lessor or to his agent to be such that electric lighting was indispensable. For, if the incoming tenant is lead to expect the electric lighting of his rooms at the cost of the landlord, it may fairly be assumed that the latter is to be compensated for it by a larger rent than he would otherwise receive. The tenant has a right to this species of illumination of which he cannot be deprived by the substitution of an inferior lighting method. Such deprivation might under some circumstances amount to an eviction though not necessarily an eviction under other circumstances.⁸⁰ And these rules which are applicable to the gas or electric lighting may apply with equal cogency to other and similar modern improvements such as steam heating and the like which, in accordance with the present method of living, in flats and apartments, are regarded as indispensable to a complete and adequate enjoyment of them by those who occupy them as lessees.

§ 284. **Easement of water supply.** As a general rule it may be said that it is not the duty of the landlord to furnish water for the tenant to be used for drinking or cleaning purposes unless he has expressly or by implication agreed to do so. Nor is he under any obligation to supply pipes or faucets for the dis-

steps and doors from the basement room into the street; that at no time was there any access from the elevator directly from the basement room; that the elevator did not adjoin the basement

room; and the way through the engine and boiler room was not a common passage way."

⁸⁰ *Parish v. Vance*, 110 Ill. App. 50, 55

tribution of water unless by agreement, express or implied.⁸¹ This general rule must be qualified by the circumstances of some cases. Thus if at the date of the execution of the lease the premises are supplied with water by a system of pipes and faucets which has either been installed therein by the landlord himself, or by his predecessor in interest, and if prior to the date of the lease the landlord has paid the water rates and taxes for the premises, the water together with the means by which it is distributed throughout the building and utilized by the tenants will pass as an appurtenance, being an incident of the building to the knowledge of the landlord and essential to its convenient enjoyment and use by the tenant. Under such circumstances, nothing short of an express agreement on the part of the tenant to furnish water and the apparatus for its distribution at his own expense would justify the landlord in discontinuing to pay the water rates or in removing the apparatus for its supply and distribution. But the rule of *caveat emptor* as applied to tenants may be invoked in the case of the quality or quantity of water which is supplied. It is the duty of the tenant of a dwelling or store to ascertain the condition and quantity of water supplied and the condition of the pipes by which it is supplied to the house and distributed through it. If he fails to do this at the date of the lease, he cannot hold the landlord responsible for a deficiency in the quality or quantity of the water and refuse to pay rent because he cannot procure water on the premises except in the case of material misrepresentation by the latter.⁸² In regard to the water supply, a tenant is not justified in removing from the premises and refusing to pay rent for the reason that the water gives out or has become unfit for use where it appeared that he had examined the water supply before making the lease, going over the property in company with one of the lessors and then knew that the premises were supplied with water by a cistern only, the supply depending wholly upon the rainfall, that the lessor had only recently acquired the ownership and that what he said to the lessee about the quantity and quality of the water was merely a repetition

⁸¹ *Sheldon v. Hamilton*, 22 R. I. 230, 233, 47 Atl. Rep. 316; *Whitehead v. Comstock & Co.*, 25 R. I. 423, 427, 56 Atl. Rep. 446, 448.

⁸² *Lewis v. Clark*, 86 Md. 327, 330, 37 Atl. Rep. 1035.

of what a former owner had told him and that the lessee knew this when he executed the lease.⁸³ In modern times the presence of apparatus and pipes for the supply of water together in buildings in towns and cities by which the tenants occupying such buildings are supplied with water for drinking and washing purposes is so well nigh universal that ordinarily such a supply of water with the apparatus and pipes would be considered an appurtenance in case the demised premises were in the city. A very different rule would obtain where the premises were in a small village or were a farm. If running water is an absolute necessity for the tenant to have in order that he may use the premises, a right to use the running water which is in the premises will pass as an appurtenance to the premises. The character of the prior use of the building is always material. Thus, a lease of a factory which at the date of the lease contained machinery operated by water power by implication conveys the right to use water which is under the control of the lessor.⁸⁴ The designation in the lease of the purpose for which the demised premises is to be used is also material. If the future use of the

⁸³ It is not the duty of a landlord to furnish water for the use of a tenant unless he has agreed to do so. The pipes and fixtures are appurtenances of the house, as gas pipes and fixtures in place at the time of the letting are, and the use of them necessarily passes with the tenement. But the water, like gas, is a commodity, and in no way attached to the realty not the property of the landlord, but to be furnished for a price by a third party. It was not the duty of the landlord to keep the pipes in repair even (*McKeon v. Cutler*, 156 Mass. 296), much less to keep them filled with water. An agreement on the part of the landlord to pay water bills or gas bills may be implied from circumstances, but the fact alone that the house is provided with pipes and fixtures is not sufficient. *McCarthy v. Humphrey*, 105 Iowa, 535. By the

court in *Sheldon v. Hamilton*, 22 R. I. 230, 233, also holding that an implied obligation on the part of the landlord to pay for water used by his tenant might arise from a general custom which the law would attach to the lease but the custom would have to be universal and reasonable. In the jurisdiction where this case was decided water was supplied to be paid for either by meter measurement by the cubic foot or at a fixed sum for each faucet, bath tub, etc. In the latter case the landlord knows in advance what he will have to pay and the inference that he has agreed to pay it and has charged it in the rent is stronger than where the amount is unknown and may by the tenants waste be very great if it is to be paid according to a meter."

⁸⁴ *Wyman v. Farrar*, 35 Me. 64.

building by the tenant requires the supply of running water, the right to have the water kept running by the landlord will pass as an appurtenance without express words. So a lease of a portion of a building "to be used as a bakery" includes the right to water as belonging and necessary to enable the lessee to carry on the business of a baker.⁸⁵ One of several tenants to whom a building is let in separate apartments may not use water running in the apartment of another tenant unless by an express agreement of the landlord and the consent of the tenant he is allowed to do so. The entry of one tenant into the apartment of another without the consent of the latter, for the purpose of procuring water is a trespass and intrusion which the law does not countenance. Where a building is let in separate apartments to several tenants, each of them has the absolute right as an appurtenance to that portion which is demised to him to use the toilet and running water in a portion of the building which is under the exclusive control of the landlord. It does not matter whether the right to the use of water is conferred by an express provision of the lease or not. If, when the lease of the separate apartment is made, the tenants of the building have a right to use the water and the toilet which is located in a portion of the same under the exclusive control of none of them, that right will unquestionably pass as an appurtenant. But the right of a tenant to use a toilet and running water in that portion of a building which is not leased to him and which is conferred upon him by an express provision of the lease, will be protected by an injunction, and the landlord will be restrained from obstructing the tenant's enjoyment of this right by closing a passage way, though there were other means of reaching the running water.⁸⁶ A lease of the "north side" of a building "consisting of a store-room, and five rooms on second and third floors of the same, together with access to the same through the hallway and porch," does not give the lessee the exclusive privilege of using a bath room on the north side which was in common use by all tenants.⁸⁷ A landlord who agrees with his tenant "to furnish the necessary seed rice and the water for irrigation of the rice crop

⁸⁵ *Gans v. Hughes*, 14 N. Y. Supp. 930, 931.

⁸⁷ *Needy v. Middlekauff*, 102 Md. 181, 62 Atl. Rep. 159.

⁸⁶ *Cooley v. Cummings*, 16 N. Y. St. Rep. 947.

or so much water as can be furnished by the irrigation well on the land" is not absolutely bound to supply irrigation for the whole crop. His obligation is measured by the capacity of the well and if the well flows sufficiently he must furnish water for the whole crop. He is bound to do what he has agreed to do in all respects and he will not be excused for failure to do so though he may have used ordinary care and diligence to supply the water.⁸⁸

§ 285. **The riparian rights of the lessee.** In treating of the rights of a tenant who has leased lands which front or face upon a river, lake or stream whether navigable or not, it will be impossible owing to the limits of space and indeed out of place in a treatise of this character, to give any exhaustive or extended consideration to the general law of waters or water courses. In determining the rights of a lessee of riparian lands to the use of the water or of the land under water, the first thing to be determined is the character and extent of the rights of his lessor in the waters or in the land under water. As regards the ownership of land under water, it may be said that so far as non-navigable streams are concerned, each riparian proprietor owns the land under water down to the thread or center line of the stream in the absence of proof to the contrary. *Prima facie*, therefore, a conveyance of land bounded by a non-navigable stream makes the grantee the proprietor of half the land covered by the stream *ad medium filum aquae*. So, a demise of land "bounded on the west by the river," in the absence of anything to the contrary, conveys therein to the lessor one-half of the bed of the soil of the river to the middle of the stream.⁸⁹ The lessee of riparian land is clothed with all the rights which were enjoyed by his lessor in the land under water. He may erect piers upon land under water for his own personal use or for the use of the public with his permission. He may erect a mill and employ the force of the running water to operate and propel the machinery in it. He may prevent the diversion of the water. For a lessee of riparian land is clothed with the same rights as an owner in possession to prevent a threatened diversion of water.⁹⁰ A lease of land having a frontage on the

⁸⁸ *Duson v. Dodd*, 101 S. W. 1040.

⁸⁹ *Dwyer v. Rich*, 1r. R. 6 C. L. 144.

⁹⁰ *Crook v. Hewit*, 4 Wash. 749.

water confers upon the lessee by implication the right to a free and unrestricted access to the shore from the water and to the water from the land, in the absence of express restrictions. The tenant therefore, has a right to moor his boats at the shore and to permit others to do so and to erect and maintain wharves. It is immaterial whether the word "appurtenances" is in the lease or not. So, when a boat club leased land fronting on a river with all the benefits and privileges thereunto belonging, the action of the landlord in mooring a boat in front of the leased land is unlawful and so far as it cuts off the boat club from using the water front it is an eviction.⁹¹ So, a lessee of water front property is entitled to the use of a dock attached to the water front for a permanent purpose and connected with it by a permanent staging.⁹² So, also, a lessee of riparian land has the right to all the advantages to be derived from the stream flowing in its natural course over and past his land, and to use the stream as he pleases for any purpose of his own which is not inconsistent with similar rights in the proprietors or occupants of riparian lands, below or above. This rule as to the use of flowing streams is applicable both to navigable and non-navigable streams. None of the proprietors or occupants of land under or facing on water can legally diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor or occupant of land throw back the water without the license or grant of the proprietor above.⁹³ So, where a lease

⁹¹ *Pridgeon v. Boat Club*, 66 Mich. 326, 33 N. W. Rep. 502, where the court says: "The subject cannot be discussed, except in connection with the object and purpose for which the lot was rented and occupied. The disturbance of the lessee's beneficial enjoyment of the water front of the premises amounts to an eviction, actual if any exists and not constructive. The right to enter up the land leased was of no interest or benefit to the defendant, only as it furnished a water front upon which the club could store its boats and launch and land the

same unobstructed." See, also, *Hooper v. Farnsworth*, 128 Mass. 487; *Underwood v. Stuyvesant*, 19 Johns. (N. Y.) 181, 10 Am. Dec. 215; *Newman v. Metropolitan El. R. Co.*, 10 N. Y. St. Rep. 12; *Oliver v. Dickinson*, 100 Mass. 114.

⁹² *Cochran v. Ocean Dry Dock Co.*, 30 La. Ann. 1365, 1366.

⁹³ *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306, 320; *Hetrick v. Deutschler*, 6 Pa. St. 32; *Woodbury v. Short*, 17 Vt. 387; *Wallace v. Drew*, 59 Barb. (N. Y.) 413, 423; *Acquaackanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Mason v. Hill*, 5 B. & Ald. 1, 24; *Wright*

conveyed the right to draw a certain quantity of water from a canal owned by the lessor to the mills of the lessees, and contained a reservation excepting and reserving to the said lessors the control of the water in the said river and in all mill ponds, bays, lakes and reservoirs at and above said premises with the right of holding back and retaining and discharging the water therefrom at their pleasure, it was held that the lessors could not at their pleasure erect a barrier to prevent the flow of water into their canal and in such way terminate the lease where such course was not necessary in their general control and management of the water.⁹⁴ Every tenant or occupant of riparian land has a right to the use of water flowing by his land for his domestic purposes as for watering his cattle. He may divert the stream for the purpose of irrigating his land provided he does not thereby interfere with the rights of proprietors below or above him.⁹⁵ So, also, a tenant may divert the water of a flowing stream and he may by machinery pump up the water and convey it by pipes to a tank or reservoir and thence into his barns or dwelling house and there use it for his domestic purposes. Priority of occupation and use of water by a mill owner give him no right to make an unreasonable use of the water by which the owners above or below him will be deprived of the beneficial use of the water. He simply acquires the right to use the water in its natural flow. The lessee of a mill site has no greater right to use the water than the lessor would have.⁹⁶

v. Howard, 1 Sim. & Stu. 190, 203; Acton v. Blundell, 12 M. & W. 348, 349.

⁹⁴ Cole v. Lake Company, 54 N. H. 242.

⁹⁵ Blanchard v. Baker, 8 Me. 258.

⁹⁶ The elementary and established principles of law relating to the use of running waters as set out by Chancellor Kent in his Commentaries, vol. III, § 52, are as follows: "Every proprietor of lands, on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminu-

tion or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land, as an incident to the land he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel

§ 286. **Right of the tenant to accretions.** It is a general rule that accretion by alluvion belongs to the owner of the adjacent soil. In other words, one who owns land which borders upon waters, whether navigable or non-navigable, acquires title to all additions to the land which are caused by the gradual deposit of particles of soil, which deposit is called alluvion, irrespective of the fact that such deposit was or was not the result of natural causes. Deposits made upon the sea shore are usually the result of the natural action of the winds and waves. In the case of streams and rivers, the accretions may result from natural causes, as the washing down of silt from up stream by the operation of the current, or from artificial causes, as, when a dam is erected by which the volume of the water is diminished, or its course deflected. In either case provided the growth of the addition is so slow as to be imperceptible, the added land belongs to the owner. He takes it, however, subject to the interests of any person to whom he has granted an estate in the land bordering upon the water. Thus, a lease for a long period of years of a tract of land described as bounded by the banks of a river con-

when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years which is evidence of it. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the use of the same water. Streams of water are intended for the use and comfort of man and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it

be made under the limitations which have been mentioned, and there will no doubt inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variation in the weight and velocity of the current. But *de minimis non curat lex* and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury. All that the law requires of the party by or over whose land a stream passes is that he should use the water in a reasonable manner, and so as not to destroy or render useless the application of the water by the proprietors above or below the stream." *Acquaackanonk Water Co. v. Watson*, 29 N. J. Eq. 366, 370.

fers the right upon the tenant to occupy land which is created by accretion during the term.⁹⁷ And a lease of accretion created after the land to which it has been added had been leased and before a grant in fee to the first lessee, does not convey the reversion in fee in the accretion to the second lessee but the fee is conveyed to and becomes vested in the first lessee by the subsequent grant to him.⁹⁸ But when the lease has expired, the parties may make a new contract which may or may not include the land which has formed by accretion. And where under a long lease the rental of the land is to be determined by an appraisal of its value at intervals, the lessor is entitled to have accretions which have been formed by the rescission of a river taken into account.⁹⁹ The same principles and rules are applicable to reliction which is the increase of land by the retreat or recession of water from the shore of a lake, river or sea. The owner of property which is stranded upon the land of another by a flood or by the gradual flow of a stream does not thereby lose title to it. It does not thereby become the property of the owner of or of the occupant of the land. The owner of the stranded property may abandon it or not as he may elect. He may enter upon the land to remove his property and his refusal or neglect to do so does not confer title upon the occupant or owner of the land. The landowner may, after notice to the owner of the stranded goods, cast them back into the water. As against a landlord owning riparian land and his tenant, the tenant may hold stranded property which is cast upon the demised premises though his possession thereof confers no title upon him as against the true owner.¹

§ 287. **Ice forming on land demised.** Ice which forms on the surface of a non-navigable stream is the property of the owner of the bed of the stream or pond.² Hence, the landowner or his

⁹⁷ *Rutz v. Kehn*, 143 Ill. 558, 29 N. E. Rep. 553, following *Cobb v. Lavalle*, 89 Ill. 331, 335, 31 Am. Rep. 91.

⁹⁸ *Rutz v. Kehn*, 143 Ill. 558, 29 N. E. Rep. 553.

⁹⁹ *Allen v. St. Louis, I. M. & S. R. Co.*, 137 Mo. 205, 38 S. W. Rep. 957.

¹ Upon the general topic see

Foster v. Juniata Bridge Co., 16 Pa. St. 393, 55 Am. Dec. 506; *Etter v. Edwards*, 4 Watts (Pa.) 65; *Berry v. Carle*, 4 Greenl. (Me.) 269; *Treat v. Lord*, 42 Me. 552; *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Sheldon v. Sherman*, 42 N. Y. 484; *Brown v. Chadbourn*, 31 Me. 9, 50 Am. Dec. 641.

² *State v. Pottmeyer*, 33 Ind. 402,

assigns have the right to harvest it and dispose of it subject to the rights of other riparian owners. The lessee of the land upon which the ice forms has generally and in the absence of an express reservation in favor of the lessor the same right to dispose of the ice as his lessor would have had but for the lease.³ Ice on leased land as soon as harvested, is the personal property of the tenant.⁴ Hence, a mortgagee who purchases land on foreclosure is not entitled to ice cut by a tenant of the mortgagor before foreclosure, though the pond from which it was cut and the house in which it is stored are covered by and sold under the mortgage.⁵ It follows from this that ice unharvested but on the land at the time of sale under the foreclosure passes to the purchaser as against a lessee.⁶ We must now consider the case of ice which forms, not upon water which covers all or a portion of the leased premises, but which forms on

³ Am. Rep. 424; Brockville, etc., Co. v. Butler, 91 Ind. 134, 46 Am. Rep. 530; Marsh v. McNider, 88 Iowa, 390, 395, 55 N. W. Rep. 469, 45 Am. St. Rep. 240, 21 L. R. A. 333; Richards v. Gauffret, 145 Mass. 486; Higgins v. Kusterer, 41 Mich. 318, 32 Am. Rep. 160; Bigelow v. Shaw, 65 Mich. 341, 32 N. W. Rep. 800; Myer v. Whitaker, 55 How. Pr. (N. Y.) 376; Reysen v. Roate, 99 N. W. Rep. 599, 92 Wis. 543.

³ A lease of an artificial pond to a manufacturing company operating a steam plant "to be used for flowage purpose only, with the exclusive right to flow, store and use water in the said pond," to a certain amount, the lease also containing a reservation to the owner of the exclusive right to take ice from the pond does not confer the right upon the lessee to flow into the pond and store therein hot water so as to melt the ice, even though it appear that the original purpose of the establishment of the pond was manufacturing and

the taking of ice therefrom had always been merely incidental. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. Rep. 937.

⁴ Ward v. People, 6 Hill (N. Y.) 144; Gregory v. Rosenkrans, 72 Wis. 220.

⁵ Gregory v. Rosenkrans, 72 Wis. 220.

⁶ The annual ice crop on a pond which may or may not form every year, and which if not removed would perish or melt away, is the most ephemeral of any of the natural products of land. The cases applicable to the cutting of timber by a tenant do not apply at all. The ice crop may be likened to grass or cranberries or other uncultivated fruits which grow naturally from the soil; or to the annual crops raised by agriculture; but less than any of these so far as its removal would be an injury to the freehold or affect the value of the land. Gregory v. Rosenkrans, 72 Wis. 220, 224.

water upon which the leased premises abuts. Though unharvested ice is more readily secured and controlled than the water which forms it, the rules which govern the rights of the riparian owner to water are applicable to it. The use of the water is appurtenant to the land which it covers and this right passes to the lessee to vest in him during the continuance of the lease. He may cut the ice not only for his own use in connection with the enjoyment of the land but for the purpose of selling it to others as well.⁷ But a lease of land on the edge of a mill pond but including no part of the pond, "for the purpose of building and maintaining an icehouse thereon" and providing for a forfeiture if it should be occupied for another purpose is not by implication a lease of the pond nor does it confer a right upon the lessee to harvest ice.⁸ And the fact that a tenant of riparian land bordering on a lake or pond was permitted by his landlord to take ice from the pond, does not of necessity establish his right to take ice. The permission of one who owns land covered by water that another may cut and take ice is a mere license which may be revoked at any time. And it is not material for how many years the owners permit another to cut and take ice when the permission is a license merely. The right to cut and remove ice may be leased by the riparian proprietor aside from a lease of the land itself. And the lessee may enjoin or maintain an action at law against a subsequent purchaser or lessee of the land attempting to cut ice thereon.⁹ A right to cut and take ice is perhaps more in the nature of a *profit a prendre* than of an easement, though it may come within the definition of an easement under certain circumstances.¹⁰ But whether the right to cut ice

⁷ Marsh v. McNider, 88 Iowa, 390, 396, 55 N. W. Rep. 469, 45 Am. St. Rep. 240, 21 L. R. A. 333. This would doubtless be the rule where the lease contains no reservation of the ice which forms on the water upon which the land abuts. There may be circumstance when from the use for which the land is leased or from the circumstances of the parties a presumption would arise that the lessee of

riparian lands was not to enjoy the right to harvest ice.

⁸ Oliphant v. Richman, 67 N. J. Eq. 286, 59 Atl. Rep. 241.

⁹ Oliver v. Olmstead, 112 Mich. 483. See, also, Larman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Grand Rapids, etc., Co. v. South Grand Rapids Co., 102 Mich. 227.

¹⁰ Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 466.

be an easement or not, it cannot be doubted that it may be expressly or by necessary implication attached to a demise of land.¹¹

§ 288. **The lease of a mill or of a mill privilege.** In a lease of a mill or a mill privilege, or mill site, these words, and similar expressions will be construed by substantially the same rules as will apply in the case of a sale of a mill. Usually the expressions, "mill dam," "mill privilege," "mill site" and other similar terms, will be construed to include the land upon which the mill is located, and the buildings, machinery and other fixtures necessary or proper to be used in connection therewith as well as the right to use the water, where the machinery is propelled by water power, to the same extent as it was used at the making of the lease.¹² Thus, a mill site or the privilege of a mill includes not only the site of the mill buildings but also the use of the water power connected therewith for milling purposes.¹³ In other words, a demise or a grant of a mill carries also the use of the power of water in the stream adjacent thereto, so far as the same is necessary to its enjoyment, with all of the incidents and appurtenances so far as the grantor or lessor had any right to convey them. For the water power which has ordinarily been used with the mill is an absolute necessary incident to the mill and is therefore an appurtenance and will pass as such even though the word "appurtenance" is not mentioned in the conveyance.¹⁴ The lessee may use the water power and all

¹¹ Where the owner of land containing a pond leased it to another without reserving the right to cut ice thereon, which she had previously leased to a third party, it was held that the lessor of the land, having been the agent of the owner to collect rents and having, in such capacity, collected rents for the owner from the lessee of the right to cut ice, it would be presumed from this fact; at least where the lease was silent that the parties to the lease of the land did not reserve the right to cut ice. *Myers v. Bolton*, 89 Hun, 342, 35 N. Y. Supp. 577, 70 N. Y. St. Rep. 198.

¹² *Anderson's L. Dict.* 675; *Ari-*

mond v. Green Bay, etc., Canal Co., 35 Wis. 41, 45, 46; *Moore v. Fletcher*, 16 Me. 63, 65, 33 Am. Dec. 633, 634; *Farrar v. Cooper*, 34 Me. 394, 397; *Howard v. Wadsworth*, 3 Me. 471, 473.

¹³ *Curtis v. Smith*, 35 Conn. 156, 158; *Stackpole v. Curtis*, 32 Me. 383, 385; *Binney's Case*, 2 Bland (Md.) 114.

¹⁴ *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219, 223; *Farrar v. Cooper*, 34 Me. 394, 397; *Blake v. Clark*, 6 Me. 436; *Moore v. Fletcher*, 16 Me. 63; *Crosby v. Brodbury*, 20 Me. 61; *Richardson v. Bigelow*, 15 Gray (Mass.) 154, 156; *Prescott v. White*, 21 Pick. (Mass.) 341; *Church v. Walker*,

its incidents in the mode it has been used before he enters. So, where the owner of an ancient mill to which there has been attached a raceway or artificial canal for carrying off the water from the mill and without the free and uninterrupted current of which the mill could not be worked and such canal or raceway has from time immemorial passed through the land of another and there is no grant or contract regulating the rights of the parties, the lessee of the mill will have the right during the term to enter on the land through which the raceway flows and to clear out obstructions therefrom, in the usual and ordinary manner in which such canals are cleaned.¹⁵ The lease of a mill or a lease of land on which a mill is situated, or is to be situated, carries with it, as incidents of the mill, the right to raise the mill pond, and to flow the lands above the mill as high as the dam has been usually kept up, to maintain the dam and flume which are necessary to support the water at that height, and to support and use the penstocks, aqueducts and channels which are necessary to convey the water to the mill, and the channels and raceways which are necessary to conduct the water from the mill to the stream below in the manner in which they have been kept and used immediately prior to the conveyance, so far at least as the lessor has a right to convey such privileges.¹⁶ For, by a lease of a mill privilege, particularly where it is with all the appurtenances of the same, there passes all the privileges and easements which had prior thereto, become attached to the same. The lessee has the right to erect and maintain a dam, to erect mills, to flow water upon the lands of the lessor or others so far as may be necessary for his purpose, to lay logs or lumber on the land or under water and to build and maintain a mill yard.¹⁷

124 Mass. 69; *Otto v. Kreiter*, 110 Pa. St. 370, 378; *Peters v. Grubb*, 21 Pa. St. 455; *Swartz v. Swartz*, 4 Pa. St. 353, 359, 45 Am. Dec. 697.

¹⁵ *Prescott v. White*, 21 Pick. (Mass.) 341, 342.

¹⁶ *Dunklee v. Wilton R. Co.*, 24 N. H. 489, 495; *Pettee v. Hawes*, 13 Pick. (Mass.) 323, 327; *Gurney v. Ford*, 2 Allen (Mass.) 576, 578; *Gibson v. Brockway*, 8 N. H. 465, 471; *Leroy v. Platt*, 4 Paige (N. Y.) 77; *Burr v. Mills*, 21 Wend.

(N. Y.) 290; *Oakley v. Stanley*, 5 Wend. (N. Y.) 523; *Kilgour v. Ashcomb*, 5 H. & J. 82; *Canham v. Fisk*, 2 Crompt. & J. 126. A lease of premises to be used as a tan yard, bordering on a stream, flowing over land owned by the landlord, does not confer the right upon the tenant to throw tan bark into the stream. *Howell v. McCoy*, 3 Rawle (Pa.) 256.

¹⁷ *Thompson v. Banks*, 43 N. H. 510.

So, the lease or a grant of a "mill site" will be construed to include all the land on the stream upon which the mill is actually situated, or, if there is no mill then existing, it will include such quantity of land as will be proper and necessary for the purpose under the particular circumstances of the case, the most material of which is the right of the lessee to avail himself of the full enjoyment and possession of the water power. As generally known under such circumstances, the use of the soil on the banks of the stream and under the water is the principle thing granted and it will be implied that the lessee or grantee shall have full power to use any portion of the soil for any purposes consistent with operating the mill. So, also, words of description in a demise of a mill site and of a water power are not given a restrictive meaning but are usually broadly construed so that the lease of a mill and water power for use in a saw mill would not of necessity restrain the lessee to such use. He might use it for any legitimate mill purpose.¹⁸

§ 289. Action for damages for the violation of an easement.

At the common law an action on the case could be maintained to recover damages for an injury to the enjoyment of a right of way.¹⁹ And it was also settled that a tenant could maintain an action where the injury to the easement resulted in a direct loss or inconvenience to him. If the injury to the easement results in

¹⁸ Ashley v. Pease, 18 Pick. (Mass.) 268, 275. "Where a party has erected a mill on his own land, and cut an artificial canal for a raceway through his own land, and then sells the land without the land through which such raceway passes, the right of such raceway shall pass as a privilege annexed *de facto* to the mill and necessary to its beneficial use. Johnson v. Jordan, 2 Met. (Mass.) 234, 37 Am. Dec. 85; Blake v. Clark, 6 Me. 436; Nichols v. Luce, 24 Pick. (Mass.) 102, 35 Am. Dec. 302." By Tenney, J., in Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 219, 223. See, also, New Ipswich Factory v. Batchelder, 3 N. H. 190, 14 Am. Dec. 346.

¹⁹ Wetmore v. Robinson, 2 Conn. 529; Martin v. Bliss, 5 Blackf. 35, 32 Am. Dec. 52; Hinks v. Hinks, 46 Me. 423; Wright v. Freeman, 5 Har. & J. 467; Cushing v. Adams, 18 Pick. 110; Bowers v. Suffolk Mfg. Co., 4 Cush. (Mass.) 332; Smith v. Wiggin, 48 N. H. 105; Carelton v. Cate, 56 N. H. 130; Osborne v. Butcher, 26 N. J. Law, 308; Lambert v. Hoke, 14 Johns. (N. Y.) 383; Greenwalt v. Horner, 6 S. & R. (Pa.) 70; Shroder v. Brenneman, 23 Pa. St. 348; Jones v. Park, 10 Phila. (Pa.) 165; Shafer v. Smith, 7 Har. & J. 67; Marshall v. White, Harp. 122; Wilson v. Wilson, 2 Vt. 68

a damage to the inheritance by affecting its permanent value then the landlord can sue.²⁰ If the injury to the easement is only temporary and is simply an inconvenience and annoyance to the tenant and simply reduces the benefit which he derives from the use of the premises during the term when the landlord cannot sue but the tenant can sue.²¹ A tenant at will may maintain an action for the interruption of a passageway to the use of which he is entitled and which is indispensable to him for the full enjoyment of his land.²²

§ 290. **The protection of the tenant's easements by an injunction.** The owner of property in whose favor an easement has been created, whether by implication or by an express agreement will be protected in equity against any infringement of his beneficial use and enjoyment of the same. An anticipated encroachment upon his rights in the easement will be enjoined whether the encroachment is by the creator of the easement or by some other person. This is the general rule in equity and is recognized because of the fact that in most cases the remedy at law will be inadequate to protect the person whose rights are infringed.²³ This rule by which equitable protection is given to the enjoyment of easements has been applied by the courts to the protection of rights of way both of a public or private character. Thus, if there is an obstruction placed or erected in the way or road which prevents its use the obstruction will be regarded as a nuisance and its continuance will be enjoined on the application of the person injured.²⁴ In all such cases, however, the party

²⁰ *Hamilton v. Dennison*, 56 Conn. 359, 15 Atl. Rep. 748, 1 L. R. A. 287; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Hasting v. Livermore*, 7 Gray (Mass.) 194.

²¹ *Foley v. Wyeth*, 2 Allen (Mass.) 135; *Avery v. New York Central & H. R. R. Co.*, 7 N. Y. Supp. 341.

²² *Foley v. Wyeth*, 2 Allen (Mass.) 135; *Hamilton v. Dennison*, 56 Conn. 359, 15 Atl. Rep. 748, 1 L. R. A. 287.

²³ *Wheeler v. Bedford*, 54 Conn. 244, 7 Atl. Rep. 22; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484;

Weber v. Gage, 39 N. H. 182; *Shaffer v. State Nat. Bank*, 37 La. Ann. 242; *Johnson v. Shelter Island Grove Camp Meeting Ass'n*, 122 N. Y. 330, 25 N. E. Rep. 484, 26 N. E. Rep. 755, affirming 47 Hun (N. Y.) 374; *Haby v. Koenig* (Tex.), 2 Posey, Unrep. Case, 439; *Berkley v. Smith*, 27 Grat. (Va.) 892; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

²⁴ *Stallard v. Cushing*, 76 Cal. 472, 18 Pac. 427; *Swift v. Coker*, 83 Ga. 789, 10 S. E. Rep. 442, 20 Am. St. Rep. 347; *Shipley v. Caples*, 17 Md. 179; *Schaidt v. Blaul*,

whose use of the right of way is prevented must establish his legal title to the easement in an action of law before he can obtain equitable relief. So, also, equity will protect the easement of light, air and view, in favor of the owner of the land to which they are attached.²⁵ The protection which is thus given to the owner of property in equity may be taken advantage of by a tenant. Upon the making of a lease whether of the whole premises or of a part thereof, the right of the landlord to the enjoyment of any easements which may belong to the building at the date of the execution of the lease passes to his tenant so far as the possession of such rights are necessary to the full and complete enjoyment of the premises by the tenant. And if during the term the lessor attempts to deal with premises in such a way as to deprive his tenants of the use of any easement to which he is entitled he will be enjoined from further interference with them and compelled to remove any obstruction already erected.²⁶

66 Md. 141, 6 Atl. Rep. 639; *Bean v. Coleman*, 44 N. H. 539; *Bechtel v. Carslake*, 11 N. J. Eq. 500; *Bailey v. Schnitzius*, 23 N. J. Eq. 235, 22 Atl. Rep. 732, 32 Atl. Rep. 219; *Wheeler v. Gilsey*, 35 How. Prac. (N. Y.) 139; *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. Rep. 442, 16 Am. St. Rep. 800; *Deer v. Doherty*, 26 Pittsb. Leg. J. (Pa. N. S.) 104.

²⁵ *Clawson v. Primrose*, 4 Del. Ch. 643; *Gwin v. Melmoth*, 1 Freem. Ch. 505; *Robeson v. Pit-tenger*, 2 N. J. Eq. 57, 32 Am. Dec. 412; *Dill v. School Board of City of Camden*, 47 N. J. Eq. 421, 20 Atl. Rep. 739, 10 L. R. A. 276; *Haggerty v. Lee*, 45 N. J. Eq. 1, 15 Atl. Rep. 399; *Lattimer v. Livermore*, 72 N. Y. 174.

²⁶ As illustrating the protection which a tenant will receive in equity, the following cases may be cited, although in them the relief was granted to the owner of the fee of the property. The owner of property was enjoined from enclosing a portion of a public park

on which his land abutted where his action destroyed the use of the park by his neighbor. *Wheeler v. Bedford*, 54 Conn. 244, 7 Atl. Rep. 22. The removal of a stairway from a passageway was also brought about by an injunction. *Stallard v. Cushing*, 76 Cal. 472, 18 Pac. Rep. 427. So also where the owner of premises had the right to use certain land as an alley, giving access to another owner taking title from the same source was enjoined from obstructing the alley by building a wooden frame across it and putting up hooks to hang meat on. *Swift v. Coker*, 83 Ga. 789, 10 S. E. Rep. 442, 20 Am. St. Rep. 347. For another case in which an alley was obstructed and the obstruction removed by equity, see *Schaidt v. Blaul*, 66 Md. 141, 6 Atl. Rep. 669. The action of the defendant in obstructing a water course so that the water backed up and rendered an alley impassable, was ground for the injunc-

§ 291. Construction of the word appurtenances. The general rule. The word "appurtenances" which in former times at least was so geneally employed in deeds and leases is derived from the word *appartenir* which is Norman French and means to belong to. Speaking broadly, the word means anything corporeal or incorporeal which is an incident of, and belongs to some other thing as principal.²⁷ At a time when the construction of written conveyances was of a more technical character

tion. *Bailey v. Schnitzius*, 53 N. J. Eq. 235, 22 Atl. Rep. 732. The right to use a private carriageway will be protected, by an injunction. *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. Rep. 442, 16 Am. St. Rep. 800. Ordinarily, an injunction will not be granted to tenants to prevent an adjoining owner building his house so near the dividing line as to obstruct the passage of light and air. But a grantor who has reserved the right to light and air from premises sold by him may enjoin his grantee from building thereon if he can show that it would result in a substantial loss to him. *Hagerty v. Lee*, 45 N. J. Eq. 1, 15 Atl. Rep. 399.

²⁷ *Bouvier*, Law Dictionary; *Bloom v. West*, 3 Colo. App. 212, 32 Pac. Rep. 846; *Scheidt v. Belz*, 4 Ill. App. 431; *Badger Lumber Co. v. Marion Water Sup. Co.*, 48 Kan. 182, 184, 29 Pac. Rep. 476, 30 Am. St. Rep. 301, 15 L. R. A. 652; *Riddle v. Littlefield*, 53 N. H. 503, 508, 10 Am. Rep. 388; *Doyle v. Lord*, 64 N. Y. 432, 437, 21 Am. Dec. 629; *Gullman v. Sharp*, 81 Hun, 462, 465, 30 N. Y. Supp. 1036; *Meek v. Breckinridge*, 29 Ohio St. 642, 648; *Miller v. Fitzgerald Dry Goods Co.*, 62 Neb. 270, 86 N. W. Rep. 1078; *Peters v. Grubb*, 21 Pa. St. 455; *Stevens v. Taylor*, 97 N. Y. Supp. 925; *Kooystra v. Lucas*,

1 D. & R. 506, 5 B. & Ald. 830, 24 R. R. 575; *Harding v. Wilson*, 3 D. & R. 287, 2 B. & C. 96, 1 L. J. (O. S.) K. B. 238, 26 R. R. 287; *Morris v. Edington*, 3 Taunt. 24, 12 R. R. 579; *Crisp v. Price*, 5 Taunt. 548; *Jarvis v. Seele Milling Co.*, 173 Ill. 192; *Parish v. Vance*, 110 Ill. App. 50, 57; *Snook & Austin Fur. Co. v. Steiner*, 113 Ga. 363, 43 S. E. Rep. 775, 777; *Patterson v. Graham*, 140 Ill. 531, 30 N. E. Rep. 460; *The Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 60, 24 Am. Rep. 719; *Seidel v. Bloesser*, 77 Mo. App. 172; *Rutherford v. Wabash R. Co.*, 147 Mo. 441, 48 S. W. Rep. 924; *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388; *Ogden v. Jennings*, 66 Barb. (N. Y.) 301, 307; *City of Lincoln v. Lincoln St. R. Co. (Neb.)*, 93 N. W. Rep. 766, 772; *Newport Illuminating Co. v. Assessors, etc.*, 19 R. I. 632, 638, 36 Atl. Rep. 426, 36 L. R. A. 266; *Johnson v. Nasworthy (Tex.)*, 16 S. W. Rep. 758, 759, 4 Willson, Civ. Cases, § 107; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207, 210; *Investment Co. of Philadelphia v. Ohio & N. W. Ry. Co.*, 41 Fed. Rep. 387, 380; *Scheel v. Alhambra Mining Co.*, 79 Fed. Rep. 821, 823; *Harris v. Elliott*, 10 Pet. (U. S.) 25, 54, 9 Law. ed. 233; *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. 779, 781.

than it is at present the word was considered of much greater importance than it is now and it was considered that in its absence from a lease or other conveyance a very restricted meaning should attach to the words of description of the premises conveyed. But at the present time very little importance is attached to its use in view of the fact that leases are so often drawn up or prepared by persons who are not skilled in, or accustomed to the use of technical language. Hence with a few exceptions those things which are incident to the principal thing will pass though the word appurtenances is not used. The word unquestionably has a technical meaning but this meaning is not inflexible and the word will be construed in connection with the principal thing conveyed.²⁸ and keeping in mind also the general intent apparent in the instrument in which it was employed as evidenced by the context and by all the circumstances.²⁹ The word as it is used in a lease may have a very different meaning to what it would have if employed in a will or in a deed conveying a fee simple. For the use to which the principal thing conveyed is to be put by the grantee, devisee or lessee usually is very material in determining the meaning of the word. The presumption that a lessor intended that something not enumerated should pass as an appurtenant to the principal thing conveyed is very strong when the lessee will be deprived of the complete and full enjoyment of the thing demised unless the thing which is incident to it is regarded as an appurtenant and impliedly conveyed by the same instrument. In short if the thing which is claimed to be an appurtenant belongs to the principal thing and at the same time is reasonably essential to the enjoyment of the principal thing it will pass as appurtenant to it,³⁰ even though the word appurtenance be not used.³¹ The fact that a 'certain thing

²⁸ *Missouri Pac. Ry. Co. v. Moffitt*, 94 Mo. 56, 60 S. W. Rep. 600.

²⁹ The word has a technical signification, and when strictly considered, is employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. When thus used to constitute an appurtenance there must exist a propriety of relation between the principal or dominant subject and

the accessory or adjunct, which is to be ascertained by considering whether they so agree in nature or quality as to be capable of union without incongruity." *Riddle v. Littlefield*, 53 N. H. 503, 508, 10 Am. Rep. 388.

³⁰ *Riddle v. Littlefield*, 53 N. H. 503, 508. 16 Am. Rep. 388.

³¹ *Jarvis v. Seale Milling Co.*, 173 Ill. 192, 195.

which is claimed to be appurtenant to the principal thing is used with it is in most cases very material and may be conclusive upon the question whether the thing is appurtenant. But the use in connection with the principal thing is not always conclusive for the thing to be an appurtenant must not only be used with the principal thing but must also be a part and parcel of it. Thus the mere fact that a stable has been used in connection with the occupation of the demised premises does not make the stable an appurtenant of the premises where the stable is not physically connected with the premises and has no open communication with it differing in character from other buildings.³² The necessity that the tenant shall use the thing which is claimed to be an appurtenance is a very strong circumstance. So, where certain parts of a building were leased with the "appurtenances," a furnace which constituted the only available means for heating the premises was included in the word, though there were grates on the floors and the grates were out of repair.³³ And as a general rule it may safely be said that what in any case shall pass as appurtenant to the leased premises, depends not upon the technical construction of the rule but upon the particular circumstances of each case, the most material and important of which are the character and use of the premises which have been leased and whether or not the thing or right which is claimed to be an appurtenance to the premises is calculated to advance the use of the premises in the hands of the tenant. In any case, the safest rule is that everything will pass which is necessary for the complete use of the premises, but things which render the use of the premises more convenient or agreeable are not necessarily appurtenances, for the premises can be used for the purposes of the tenant without them. We must always bear in mind that the word "appurtenances" is not applied to the thing which is the principal object of the lease but rather to those things which are incidental and inferior to the principal thing. So, where a railroad company leased a part of its right of way

³² Maitland v. McKinnon, 1 H. & C. 607.

³³ Stevens v. Taylor, 97 N. Y. Supp. 925. The court also held that the fact that the lease was silent as to heating the premises

was immaterial as the tenant had that right by implication. Having this right by implication the tenant has the right to use the heating apparatus he finds in the house.

described by metes and bounds on which there were certain structures connected with the tenant's coal mine and it was provided that the lessor should be exempted from liability for damages by fire to any structures that may be erected on the land leased or their appurtenances or contents, the word "appurtenances" did not include the coal mine, pit heads or other parts of the mining property outside of the land mentioned in the lease but that the tenant's property inside the mining property was appurtenant to his mine outside the limits.³⁴ It is a disputed question whether the conveyance of land "with the appurtenances" will create an easement in the land where none existed before. On the one hand, it has been said that the conveyance of land specifically described "with all appurtenances thereof," will not create a right of way over the other land of the grantor unless the creation of such a right of way is absolutely necessary to give the grantee access to his land.³⁵ The mere fact that such a right of way makes access to the land more convenient is not controlling. On the other hand it has been expressly held that the word "appurtenance," particularly where it is used in connection with other words of similar meaning may be sufficient not only to convey the existing easement but also create one.³⁶

³⁴ *Rutherford v. Wabash R. R. Co.*, 147 Mo. 441, 48 S. W. Rep. 924.

³⁵ *Oliver v. Hook*, 47 Md. 301, 309; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188; *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161; *Miller v. Bristol*, 29 Mass. 550; *Bonelli v. Blakemore*, 66 Miss. 136, 5 So. Rep. 228; *Barker v. Clarke*, 4 N. H. 380, 17 Am. Dec. 428; *Stuyvesant v. Woodruff*, 21 N. J. Law, 133, 47 Am. Dec. 146; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Kenyon v. Nichols*, 1 R. I. 411.

³⁶ *Knowles v. Nichols*, 14 Fed. Cas. No. 7,897; *Molitor v. Sheldon*, 37 Kan. 246, 15 Pac. Rep. 231. Whether the easement, such as a right of way or a right of access or any other similar privilege, will

pass by the use of the word "appurtenances" depends largely upon the construction of the lease. The following cases which are cited to illustrate the use of the word involved the construction of deeds, but it is believed that they are valuable as showing the meaning which the courts would place upon the word "appurtenances" in the case of a lease. In these cases a right of way was held to pass by the use of the words "with the appurtenances." *Peck v. Loyd*, 38 Conn. 566; *Chicago, S. F. & C. R. Co. v. Ward*, 128 Ill. 349, 18 N. E. Rep. 828; *Mendel v. Delano*, 48 Mass. 176; *Foot v. Manhattan Ry. Co.*, 58 Hun (N. Y.) 478, 12 N. Y. Supp. 516; *Kenyon v. Nichols*, 1 R. I. 411. On the other hand, it

§ 292. Things which have been held not to pass as appurtenances. The term "appurtenances" as it is used in conveyances usually is intended to include nothing but the land and such easements as belong thereto and which are a part of the land.³⁷ The word as used in a deed or lease does not usually convey corporeal things but only incorporeal things such as privileges and easements.³⁸ For example, the word will not pass an article of personal property which is in no wise connected with the premises demised and which is not indispensable to its full use and enjoyment by the lessee, though the thing may have been used in connection with the premises.³⁹ And it is very well settled that by the use of the word appurtenance, one piece of land will not pass as an appurtenance to another piece of land.⁴⁰

has been held that a right of way does not pass under the term of "appurtenance" if it is not a parcel of the premises and necessary for their use and enjoyment. *May v. Smith*, 3 Mackey, 55; *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161; *Lankin v. Terwillinger*, 22 Oreg. 97, 29 Pac. Rep. 268. Generally an easement will not pass under the use of this word unless it was actually annexed to the principal thing. *Spaulding v. Abbott*, 55 N. H. 423; *Parsons v. Johnson*, 68 N. Y. 62, 63 Am. Rep. 149; *Longendyke v. Anderson*, 101 N. Y. 625, 4 N. E. Rep. 629; *Swansey v. Brooks*, 34 Vt. 451. In *Oliver v. Hook*, 47 Md. 301, on page 309, the court said: "If there was a way belonging to the estate as a pre-existing easement, such way would pass by force of these terms, or even without the use of them; but such terms used in a conveyance of part of a tract of land, as in this case, will not create a new easement, nor give a right to use a way which had been used with one part of the land over another part while both parts belonged to the same owner, and

constituted an entire estate. A party cannot have an easement in his own land as all the uses of an easement are fully comprehended and embraced in his general right of ownership."

³⁷ *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57; *Meek v. Breckinridge*, 29 Ohio St. 642, 648.

³⁸ *Co. Litt.* 121; *Scheidt v. Belz*, 4 Ill. App. 431; *Buszard v. Capel*, 6 Bing. 151, 161, 8 B. & C. 141-150.

³⁹ *Scheidt v. Belz*, 4 Ill. App. 431; *Barritt v. Bell*, 82 Md. 110, 52 Am. Rep. 361.

⁴⁰ The following cases sustain the proposition that land will not pass as an appurtenant. *Ogden v. Jennings*, 62 N. Y. 526, 531; *Holmes v. Seeley*, 19 Wend. (N. Y.) 507; *Oakley v. Stanley*, 5 Wend. (N. Y.) 523; *Voorhees v. Burchard*, 55 N. Y. 98; *Wilson v. Hunter*, 14 Wis. 683. Some English cases are *Nicholas v. Chamberlain*, Cro. Jac. 131; *Pierce v. Sellick*, 18 C. B. 321; *Tyrringham's Case*, 4 Coke, 37a; *Hill's Case*, Plowden, 168a; *Smith v. Martin*, 3 Saund. 400. In *Tyrringham's Case*, 4 Coke, 37a, it was

Hence, it follows that where there is a conveyance or a written lease of land in which the premises are described by well defined boundaries, so that it is clearly to be understood how much land the grantor or lessor intended to convey, the addition of the word appurtenances will not pass land not included in the boundaries. Thus, the lease of a building described by a particular name does not pass as an appurtenance, any interest in the land adjoining the land on which the building is located or any interest in an outbuilding on such land, though the outbuilding might have been used with the demised premises.⁴¹ So, where in a lease, land is demised as the "Bell house with all the appurtenances thereunto belonging," for the purpose of a hotel, it was held that a kettle situated upon an adjoining lot which was not indispensable to the enjoyment of the hotel property, although it was very convenient for the use of the tenant, did not pass as an appurtenant to the hotel, and the situation was not altered by the fact that the lessor of the hotel had used the kettle in connection with his hotel business.⁴² And generally the word "appurtenances" will not carry to the lessee the use of any building or structure which is not on the premises demised though this building belonged to the landlord and was used by him in his business in connection with the premises.⁴³ The demise of a house with the appurtenances will pass the house, with the orchards, yards and curtilage and garden but

said "prescription doth not make a thing appendant unless the thing which shall be appendant agrees in quality and nature to the thing to which it shall be appendant as a thing corporate cannot be appendant to a thing corporate."

⁴¹ *Oliver v. Dickinson*, 100 Mass. 114, 117 (a lease). See, also, *New York Cen. R. R. Co. v. B.*, N. Y. & E. R. R. Co., 49 Barb. (N. Y.) 501, 505 (a lease of a railroad); *Harris v. Elliott*, 10 Pet. (U. S.) 25, 55, 56; *Leonard v. White*, 7 Mass. 6, 8, 9; *Jackson v. Hathaway*, 15 John. (N. Y.) 447, 454;

Doyle v. Lord, 64 N. Y. 432, 437, 21 Am. Rep. 629.

⁴² *Barrett v. Bell*, 82 Mo. 110, 114.

⁴³ *Frey v. Drahos*, 6 Neb. 1, 29 Am. Rep. 353; *Grant v. Chase*, 17 Mass. 443; *Spaulding v. Abbott*, 55 N. H. 423; *Barber v. Clark*, 4 N. H. 380; *Coolidge v. Hagar*, 43 Vt. 9; *Swazey v. Brooks*, 34 Vt. 451; *Seavey v. Jones*, 43 N. H. 441; *Jackson v. Stricker*, 1 Johns. Cases (N. Y.) 284; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Bettisworth's Case*, 2 Coke. 516; *Buszard v. Capel*, 8 B. & C. 141, 6 Bing. 150; *Ogden v. Jennings*, 62 N. Y. 526.

not the land especially if it be at a distance though occupied with the house; so, a demise of a house with appurtenances will not pass an adjoining building which is not accounted parcel of the house, although held with it for many years.⁴⁴ A lease of a house with all the rooms and chambers, with all the appurtenances belonging, or in any way appertaining thereto does not pass the use of a room formerly occupied with the rest of the house with which the room had communicated by means of a door which had, however, been closed by a wooden partition for many years before the execution of the demise.⁴⁵ It should be said, however, that the rule above stated to the effect that land will not pass as an appurtenance of land, has some exceptions. These exceptions occur principally in cases of the lease or conveyance of land fronting on streams or other bodies of water. Where riparian land is conveyed or is demised without or with the use of the word "appurtenances" in connection therewith, it is usually considered that the land under water, adjoining the land demised, passes with the demised land as being absolutely indispensable to the full use and enjoyment of the land located on the margin of the stream. Thus, flats necessary to the use of a wharf will pass as appurtenances in a conveyance or lease of a wharf.⁴⁶ So, also, under a lease of a wharf, the land upon which the wharf is built, and the tide and shore land adjoining to the wharf will pass as an appurtenance though not mentioned.⁴⁷ And an addition formed by the extension of a pier line the result of an accretion by alluvion, will pass as an appurtenance to a pier.⁴⁸ And generally by a demise of a mill or mill privilege, not only the mill itself, but also the land on which it stands and all the land adjoining and surrounding it both above and below water including a sufficient portion of the bed of the stream to erect a dam upon will pass as an appurtenance.⁴⁹ An exception to the rule occurs where the question arises as to the right of the lessee to have the premises which he has leased supported by the land upon which it is built and by land which ad-

⁴⁴ *Bryan v. Weatherhead*, Cro. Jac. 17.

⁴⁵ *Kerslake v. White*, 2 Stark. 508.

⁴⁶ *Doane v. The Broad Street Ass'n*, 6 Mass. 332.

⁴⁷ *Brown v. Carkeek*, 14 Wash. 443, 44 Pac. Rep. 889.

⁴⁸ *Williams v. Baker*, 41 Md. 523, 528.

⁴⁹ *Whitney v. Olney*, 3 Mason (U. S.) 280.

joins it. Where the lease is of the buildings only and neither land nor any interest in the land is mentioned, no estate in the land is created in the lessee. Still, though the tenant may have no estate in the land, he has as an appurtenant and incident of his possession of the buildings, such an interest in the land as is necessary to support the premises. The lessee's right to the support of the subjacent land exists only while it is necessary to enable him to enjoy the full possession of the building upon it and when the building is destroyed or removed, the right passes to the lessor.⁵⁰ The question whether a particular place is a part of the demised premises does not depend solely and exclusively upon how the premises are bounded in the lease, but also upon the intention of the parties, which may be determined by proving such extrinsic facts explanatory of the subject and of the circumstances of the parties as will show the meaning of the instrument and the real intention of the parties to it.⁵¹ So, also, it may be admitted that it is a well established principle that any privilege or easement which is necessary to the enjoyment of the demised premises will pass to the lessee as an appurtenance thereof, though it is not true that by the use of the word,

⁵⁰ *Snook v. Steiner*, 117 Ga. 363, 43 S. E. Rep. 775, 777.

⁵¹ *Trimble's Heirs v. Ward*, 14 B. Mon. (Ky.) 8. The privilege of using a well in an adjacent lot so long as it shall remain does not raise an implied covenant that it shall remain. The use of the well is not an appurtenant as it is not absolutely essential to the full enjoyment of the demised premises and the lessor may therefore determine how long the well shall remain. *Basserman v. Society of Trinity Church*, 39 Conn. 137. "Appurtenances" in a lease of a hotel does not include a kettle for heating water located in an adjacent lot, though it has been used by the lessor in connection with the hotel. *Barrett v. Bell*, 82 Mo. 110, 52 Am. Rep. 361. A restaurant conducted by a lessor in an-

other part of the demised premises is not an appurtenance, not being indispensable to the full enjoyment of the demised premises, and consequently may be discontinued or removed at any time during the term by the lessor. *Gale v. Heckman*, 16 Misc. Rep. 376, 38 N. Y. Supp. 85. The rights of the lessor which arise out of his merely personal agreement with a third party do not pass as appurtenant. So the lessor's right to lay a railroad track on a public highway under a municipal ordinance to connect his premises with a railroad, and his contract with such railroad not being attached in any way to the land demised, do not pass to the lessee in the absence of express agreement. *People, etc. v. C. & N. W. R. W. Co.*, 57 Ill. 436, 440.

whatever is convenient for the use of the premises passes. There is a great difference in meanings between convenience and necessity and no privilege will pass to the lessee unless it is expressly granted merely because it is convenient for him to enjoy it. Thus, though the right to use a stream will pass to the lessee of a mill privilege as a necessary appurtenance thereto, he will only have the right to use it in a necessary and proper manner. And he will not be permitted to defile the stream by casting waste or rubbish into it merely because this use of the stream will promote his convenience.⁵² Where a lease is renewed with the intention on the part of the tenant to continue the use of the building for the same purpose as he had heretofore used it, the character of his tenancy under the old lease may be proved for the purpose of determining whether a certain privilege passed to him under the new lease as an incident to it. Thus, where a landlord had leased a portion of his building a part of which was occupied by him, and had agreed to permit the tenant to have a half of the steam power which was generated by the engine owned by the landlord; and it appears in the evidence that the tenant had occupied the same premises and had the use of the same engine, that the use of steam was necessary to the tenant, and that he had been using it right along, it was held that the use of the steam passed as an incident of the new lease. Under such circumstances, the tenant may enjoin the landlord from depriving him of the use of the steam.⁵³

⁵² Howell v. McCoy, 3 Rawle (Pa.) 256, 271.

⁵³ Thomas v. Wiggins, 41 Ill. 471. "Appurtenances are defined: 'Things belonging to another thing, as principal, and which pass as incident to the principal thing.' Bouv. Law Dic. Another definition is: 'A thing used with and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant.' 3 Washb. Real Prop. 626, 627; Com. Dig. Appendant and Appurtenant (A). The word, 'appurtenances,'

has a technical signification, and when strictly considered, is employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. Where the term is thus used, in order to constitute an appurtenance there must exist a propriety of relation between the principal and dominant thing or subject, the accessory or adjunct, which is to be ascertained by considering whether they so agree in nature and quality as to be capable of union without incongruity. These distinctions are refined, and in the com-

§ 293. **Meaning of the word half.** The word "half" in a lease of land as in a deed as used in the expression "half of a lot," means half in quantity in the absence of a context or of facts from which a different meaning may be inferred.⁵⁴ Thus, two parts of a farm or other piece of land separated by a road or stream may be called halves without regard to their quantity and in such cases the word half will not have its primary meaning but the circumstances and the customs of the parties in using the word will be taken into account to ascertain what meaning the parties attached to it.⁵⁵ But the mere fact that a land fronting on a meander lake is to be used for mining purposes by the lessees of separate halves and that either may desire to mine under the lake does not vary the primary meaning of the word half.⁵⁶ The terms section, half section or quarter section properly mean, and are so construed by the general land department, the land in the sectional and subdivision lines and not the exact quantity which a perfect measurement of an unobstructed surface would show.⁵⁷

mon practice of modern conveying are not much regarded—the term, 'appurtenances,' in a vast majority of cases in deeds and leases, having in fact, I presume, no meaning whatever in the minds of the contracting parties, who append the necessary formula by force of custom and example which has for so long a time applied it to grants and leases of a principal thing, to which no inferior easement or servitude whatever, in fact, belongs. If employed in its true and technical sense, it may sometimes have such meaning and importance that, if omitted, an appurtenance will not pass. And the use of such superfluous formula is ordinarily harmless and will seldom lead to confusion or misunderstanding. But, ordinarily, whatever easements and privileges legally appertain to property pass by a conveyance of the property itself without additional words. The grant of a

thing passes the incident as well as the principal, though the latter only is mentioned, and the effect cannot be avoided without an express reservation. Thus, a garden is parcel of a house and passes without the addition of the word "appurtenance." Taylor's Landlord & Tenant, sec. 161. A grant of a thing will include whatever the grantor had power to convey which is reasonably necessary to the enjoyment of thing granted." By the court in *Riddle v. Littleton*, 53 N. H. 503, 508, 509.

⁵⁴ *Angres Boom Co. v. Whitney*, 26 Mich. 52; *Dart v. Barbour*, 32 Mich. 271; *Heyer v. Lee*, 40 Mich. 353; *Jones v. Pashby*, 62 Mich. 614.

⁵⁵ *Jones v. Pashby*, 48 Mich. 614, 634.

⁵⁶ *Hartford I. M. Co. v. Cambria Mining Co.*, 80 Mich. 491, 499, 45 N. W. Rep. 351.

⁵⁷ *Brown v. Hardin*, 21 Ark. 325.

CHAPTER XII.

THE CONSTRUCTION OF LEASES.

- § 294. What law governs.
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- 297. Writings will be construed together.
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§ 294. What law governs. The general rule that the law of the place where land is situated determines all questions as to the mode or legality of its transfer is applicable to leases.¹ This rule is not confined to the formal execution of the lease but extends to all questions as to its construction and interpretation. And not only must the court invoke the law of the place where the land is to determine the validity and construction of the contract but also to determine whether the subject matter is real or personal property.² Thus, for example, a court in the state of New York construing a so-called lease of coal in Pennsylvania buried beneath the surface of the earth and forming a part of it, held that the coal was land and followed the law of Pennsylvania which regards a lease of all coal on premises therein described with the right to take it exclusive of the grantor as in legal effect a grant in fee of the coal as land and vests the fee thereof in the so-called lessee.³ The rights of the parties to a lease will be construed and regulated by the law, either common or statute, which existed at the date of its execution and the

¹ Genet v. Del. & Hudson Canal Co., 13 Misc. 409, 421. 35 N. Y. Supp. 147.

² Chapman v. Robertson, 6 Paige (N. Y.) 627, 630.

³ Genet v. Delaware & Hudson Canal Co., 13 Misc. 409, 424, 425.

rights which have thus vested will not be in any way divested or affected by the repeal or modification of such law.⁴

§ 295. **The construction of the language of written leases.** The general rules governing and regulating the construction of written contracts when involved in litigation are usually applicable to the construction of leases in writing. Inasmuch as a detailed discussion of these rules, however appropriate it may be in a work treating of the law of contracts, would be manifestly out of place in these volumes, where only a very minute portion of the general law of contracts is under consideration, no lengthy discussion of such general principles may be expected in this treatise. In the first place, it is a general rule that in the construction of a lease, the intent of the parties must be reached by an examination of the whole instrument, and such construction adopted as will carry out the intent, though a single clause would lead to a different construction.⁵ In construing a lease where the language is ambiguous, the courts will endeavor to ascertain the intention of the parties and when ascertained, to give effect to it, but where the language is unambiguous, though the parties may have failed to express their real intention in the lease, there is no room for construction, and the legal effect of the lease must be enforced.⁶ The provisions of a lease will not be extended by construction.⁷ As a rule the construction of the language of a written lease is a matter of law

⁴ *Swan v. Kemp*, 97 Md. 686, 55 Atl. Rep. 441, 443; *Appeal Tax Court of Baltimore City v. West Md. R. R. Co.*, 50 Md. 274, 295. Thus in a case where a statute providing that leases of land for more than 15 years might be redeemable after the term of 15 years had expired at the option of the tenant was modified and affirmed by a subsequent statute which merely altered it in some immaterial particulars, leases executed between the passage of the original act and the amendatory act are within the operation of the first act. *Swan v. Kemp*, 97 Md. 686, 55 Atl. Rep. 441.

⁵ *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105; *Union Water Power Co. v. Lewiston*, 95 Me. 471, 49 Atl. Rep. 878; *City of New York v. United States Trust Co.*, 101 N. Y. Supp. 574; *Johnson v. Kindred State Bank*, 96 N. W. Rep. 588, 589; *Seaman v. Civill*, 45 Barb. (N. Y.) 267, s. c. 31 How. Pr. (N. Y.) 52; *Orphan Asylum Society v. Waterbury*, 8 Daly (N. Y.) 35.

⁶ *Walker v. Tucker*, 70 Ill. 527, 532; *Thompson v. Stewart*, 60 Iowa, 223, 225, 14 N. W. Rep. 247.

⁷ *Windsor Hotel Co. v. Hawk*, 49 How. Pr. (N. Y.) 257.

for the court and not for the jury.⁸ And if the terms of an oral lease are doubtful, it is for the jury to determine what they are upon all the evidence.⁹ As a general rule, where a lease is susceptible of two constructions, the one most favorable to the lessee must prevail.¹⁰ This rule does not apply to the construction of the lease where the intention of the parties is clearly apparent from the lease, when it is examined in the light of surrounding circumstances.¹¹ Where a provision of a lease stipulating damages for holding over is highly penal and almost unconscionable and the lease admits of two constructions as to the time such damages would accrue, the construction which is most favorable to the lessee ought to be had. The court must, if possible, avoid a harsh and oppressive construction of the lease.¹² It is contrary to the well-settled rules of construction to give the language of a lease a narrow and technical interpretation which is based upon some particular word or clause contained in it. The intention of the parties must be taken from the lease as a whole and such a construction must be had as will, if possible, render all its clauses consistent and harmonious.¹³ Where a lease contains both written and printed provisions, effect is to be given to both if they are not incon-

⁸ *Needy v. Middlekauff*, 102 Md. 181, 62 Atl. Rep. 159; *Brown v. Schiappacassee*, 115 Mich. 47, 72 N. W. Rep. 1096; *Newman v. Tolmie*, 80 N. Y. Supp. 990, 81 App. Div. 111; *Dumn v. Rothermel*, 112 Pa. St. 212, 17 W. N. C. 292, 43 L. I. 376, 3 Atl. Rep. 800.

⁹ *State v. Forsythe*, 89 Mo. 667, 1 S. E. Rep. 834.

¹⁰ *Doe v. Dixon*, 9 East, 15; *Cook v. Bisbee*, 18 Pick. (Mass.) 527, 529; *Commonwealth v. Sheriff*, 3 Brewst. (Pa.) 537; *Presbyterian Church v. Pichet*, Wright (Ohio) 57; *Windsor Hotel Co. v. Hawk*, 49 How. Pr. (N. Y.) 257, 262.

¹¹ *Pere Marquette R. Co. v. Washash R. Co.* (Mich. 1906) 104 N. W. Rep. 650. Leases of doubtful duration are construed favorably

to the tenant. If the duration appears to be optional with some one, it will be presumed that the tenant is to have the option. *Comm. v. McNeile*, 8 Phila. 438, 26 L. I. 205, 3 Brewst. (Pa.) 537. Gas and oil leases are construed and regulated generally by the same rules of law as are applicable to leases of farm lands. *Kelley v. Oil Co.*, 57 Ohio St. 317, 49 N. E. Rep. 399, affirming *Ohio Oil Co. v. Kelley*, 6 Ohio Ct. Dec. 470, 9 R. 511.

¹² *Klingling v. Ritter*, 58 Ill. 140, 141.

¹³ *Harlow v. Iron Co.*, 36 Mich. 105, 117; *Pendill v. Maas*, 97 Mich. 215, 220; *Berridge v. Glassey*, 112 Pa. St. 442, 455, 3 Atl. Rep. 583, 56 Am. Rep. 322.

sistent. A printed clause providing that if default shall be made in performing any of the covenants, then it shall be lawful for the landlord to re-enter, applies to a written provision that the lessee shall pay all taxes and assessments assessed during the term before they become delinquent.¹⁴ If the printed and the written provisions of a lease cannot be reconciled, the written provisions should prevail as being presumptively expressive of more deliberate intention of the parties.¹⁵ Where the language of the operative part of a lease is of doubtful meaning, the recitals preceding the operative part may be used as a test to discover the intention of the parties and fix the true meaning of the words. When the words in the operative part of the lease are clear and unambiguous, they cannot be controlled by the recitals in the lease. Where the recitals do not express all that is included in the operation of the lease, they cannot be regarded as a full and clear expression of the intention of the parties.¹⁶ A material word which has been apparently omitted from the lease by mutual mistake will be inserted in construing a lease where the lease contains other words which cannot have their proper effect unless that word is introduced, though the particular clause in the lease where the word ought to be conveys a sufficiently definite meaning without it.¹⁷ Generally the construction of the covenants of a lease must be the same in equity as they are in law. In spite of this fact there are circumstances where in equity a covenant will be reformed either because of accident or mistake, and by this process practically a new covenant will be made. But this new covenant, after it has been made, will be construed in equity by the same rules as it would be construed in a court of law.¹⁸

§ 296. The lease construed by the conduct of the parties. Where the language of the lease is ambiguous so as to leave the intention of the parties to the lease in doubt and different interpretations are permissible, recourse may be had to the conduct of the parties and to the circumstances surrounding them when

¹⁴ *Heiple v. Reinhart*, 100 Iowa, 525, 69 N. W. Rep. 871.

¹⁵ *Seaver v. Thompson*, 189 Ill. 158, 59 N. E. Rep. 553, affirming 91 Ill. App. 500.

¹⁶ *Walker v. Tucker*, 70 Ill. 525, 527.

¹⁷ *Dodd v. Mitchell*, 77 Ind. 388, 392.

¹⁸ *Eaton v. Lyon*, 3 Ves. 692; *Iggulden v. May*, 9 Ves. 329, 334.

the lease was signed and to the construction which they have placed upon the lease in order to ascertain their intention.¹⁹ The conduct of the parties from which an intent may be implied must be wholly free from mutual mistake or the influence of fraud for the conduct of one who is acting under a mistake of law or of fact furnishes no proper basis for an implication that he understands the writing and acts as he does with an intent to perform it. Thus, there is not such a construction of the lease by the parties as will bind the court, where under a mistake of law, the lessee of a gas lease paid an annual rental higher than that provided by the plain terms of the lease.²⁰ In other words, no intent will be inferred from the conduct of the parties which is contradictory to the plain language of the lease. So, though a lease made on Sunday is void under the statute and confers no contractual rights on either party to it, it may be read by the court in connection with other circumstances to explain the character of a lessee's possession and to account for the conduct of both parties in relation to the land. It may be regarded as a declaration or admission constituting a part of the *res ges-*

¹⁹ Hall v. Harton, 79 Iowa, 352, 357, 44 N. W. Rep. 569; Sargent v. Adams, 3 Gray (Mass.) 72, 79; Doe v. Burt, 1 T. R. 701; Siegel v. Colby, 61 Ill. App. 315; Frigeris v. Stillman, 17 La. Ann. 23; Rubens v. Hill, 213 Ill. 523, 72 N. E. Rep. 1127, affirming 115 Ill. App. 565; Hasbrouck v. Paddock, 1 Barb. (N. Y.) 615, 638; Wood v. Sharpless, 174 Pa. St. 588, 595, 34 Atl. Rep. 319, 38 W. N. C. 153; Anzolone v. Paskusz, 96 App. Div. 188, 89 N. Y. Supp. 203; Woods v. Edison Electric Ill. Co., 184 Mass. 523, 69 N. E. Rep. 364. In determining what the rights of the successors of a lessee are, the court will take into consideration the construction placed on the provisions of the lease by the parties themselves. Coatsworth v. Schoellkopf, 55 N. Y. Supp. 753, 37 App. Div. 295. For the construction by the parties as to the length of the term see Siegel v. Colby, 61

Ill. App. 315. In Coatsworth v. Schoellkopf, 55 N. Y. Supp. 753, it is said: "The original parties to this lease have long since departed this life, and their heirs, assigns and successors in interest have continued peaceably to carry out the provisions of the lease until the service of the defective notice to which we have referred. These successors in interest have thus admitted that the liabilities and rights under the lease of the original parties devolved upon them and this is a practical construction on their part in favor of the position here taken that the covenant as to the buildings runs with the land; and, when the words of a grant are ambiguous the courts will call in aid the acts done under it as a clue to the intention of the parties."

²⁰ Diamond Plate-Glass Co. v. Terrell, 22 Ind. App. 346, 52 N. E. Rep. 168.

*tac.*²¹ Thus, where injuries by "reasonable use" were excepted, it is proper in determining the meaning of the word "reasonable," which is, under the circumstances ambiguous, to consider the condition, situation and adaptation of the land for any particular use, the statements of the parties as to the use to which it had been put, and was to be put by the lessee, and that it had no rental value for any other purpose, all of which may be proved by parol.²²

§ 297. **Writings will be construed together.** Where the terms of an agreement between the lessor and the lessee are contained in two or more writings each of which is incomplete in itself, though all taken together constitute a lease, all the writings will be construed together in order to ascertain the real intention of the parties to the lease.²³ A prior or contemporaneous writing may be incorporated into a written lease by a reference to it in the lease if referring to the same property and if it recites it as in existence when the lease is executed. But two leases of different dates of distinct pieces of property, though between the same parties, neither of which refers to the other, cannot be construed together but must be treated as separate instruments.²⁴ But two or more leases are not necessarily construed together merely because they relate to the same premises. It must appear that the parties considered and treated them as one instrument, the best evidence of which intention is that one of them refers to the other.²⁵

§ 298. **Merger in lease of all preliminary conversations.** The general rule is firmly settled that where parties have entered into a written contract, all previous conversations, negotiations and propositions, whether oral or written, are to be regarded as merged in the final and definite agreement in writing.²⁶ In

²¹ *Rainey v. Caps*, 22 Ala. 288.

²² *Bartel v. Brain*, 13 Utah, 162, 44 Pac. Rep. 715.

²³ *Cadwallader v. United States Exp. Co.*, 147 Pa. St. 455, 23 Atl. Rep. 775, 29 W. N. C. 504; *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. Rep. 537.

²⁴ *Anderson v. Winton*, 136 Ala. 422, 34 So. Rep. 962. If its terms are known to all, the parties to a lease may adopt by reference the terms of a prior lease between

them and a third person. *Eubank v. May, etc., Hardware Co.*, 105 Ala. 629, 17 So. Rep. 109. See, also, *Putnam v. Stewart*, 97 N. Y. 411, 414.

²⁵ *Anderson v. Winton*, 136 Ala. 422, 34 So. Rep. 962, 965.

²⁶ *Ruse v. Mutual Benefit L. Ins. Co.*, 23 N. Y. 516; *Bailey v. Snyder*, 13 S. & R. (Pa.) 160; *Haycock v. Johnston* (Minn.) 83 N. W. Rep. 494; *King v. Enterprize Ins. Co.*, 45 Ind. 43; *Grand Trunk W.*

theory and logically it must be assumed that the writing when executed constitutes the consummated intention of the parties and that by signing it they have at least tacitly agreed to discard and forget everything which preceded it and which has not by them been embodied in the instrument they have signed. The intention of the instrument was to avoid future controversy as to the things agreed to in it and to hold that prior conversations can be proved to enlarge or contradict is to open wide the door for future litigation. These considerations are applicable to the lease and to the preliminary negotiations which lead up to its execution. For a lease, it is clear, is a contract prescribing the rights, duties and liabilities of lessor and lessee and if full and apparently complete in itself, may with reason be assumed to contain the full expression of the intention of the parties as to the extent and character of such rights, duties and liabilities. In other words, a lease as executed absorbs and incorporates all that has preceded it between the parties and in the absence of fraud, accident or mistake may be conclusively presumed to represent the ultimate and final deliberation of landlord and tenant.²⁷ Hence, it cannot be shown by parol that the landlord agreed not to erect a new building adjacent to that leased and which would, to a certain extent, interfere with the tenant's enjoyment of the leased premises unless such an agreement has been inserted in the lease.²⁹

Ry. Co. v. Chicago & E. I. R. R. Co., 141 Fed. Rep. 785.

²⁷ *Phillbrook v. Emswiler*, 92 Ind. 590, 591; *Ranalli v. Zeppetelli*, 94 N. Y. Supp. 561; *New York v. Mason*, 9 N. Y. St. Rep. 282; *Gerry v. Siebrecht*, 88 N. Y. 1034, 1037. (Construing words "ready for occupancy.")

²⁸ *Haycock v. Johnston*, 81 Minn. 49, 83 N. W. Rep. 494.

Merger. Where the terms of a lease are in writing, the rights and duties of the parties depend upon the terms or legal intentment of the lease itself, or as otherwise expressed, that it is conclusively presumed that the

whole engagement of the parties and the extent and manner of their undertaking are embraced in the writing. This rule has been repeatedly applied to cases like the present, where tenants have set up oral agreements or promises alleged to have been made by the landlord, at the time of, or before, the execution of the lease, and as an inducement thereto. The alleged promises have in most cases been to put the premises in repair but they have uniformly been held to have been merged in the lease. By *Rapallo, J.*, in *Wilson v. Deen*, 74 N. Y. 531, on p. 534, citing

§ 299. **The meaning of technical terms in a lease.** Technical terms of law or of commerce used by the parties in the lease will ordinarily be presumed to have been employed in their primary sense. Thus, where a purely technical term is found in the quaint language of ancient leases, it will be presumed that the parties to the lease used it in its strict common law meaning in the absence of evidence to the contrary. This is especially true where the lease was prepared by a person learned in the law.²⁹ There is no presumption of law, where the parties to the lease use a technical word, that they use it in any restricted or secondary sense; or that they use it according to the peculiar sense in which it is understood in the neighborhood where the premises are located. If there is disputed evidence of the meaning of a technical word, its sense is for the jury.³⁰ Parol evidence will be received to explain the meaning of a technical word used in a lease where the word has two or more meanings for the purpose of showing what rights passed by the use of such word.³¹

§ 300. **When parol evidence is received in the case of leases.** There are some exceptions to the rule by which parol evidence is excluded in case of a written lease. While the lease cannot be varied or contradicted, parol evidence may be received in connection with it for certain purposes. Thus, parol evidence is receivable to show that the execution of a written lease was procured by false and fraudulent representations.³² The representations, though by word of mouth, may be proved, and, if they are sufficient and material, the lease will be set aside. Parol evidence is also received to prove an oral contract which was

Cleves v. Willoughby, 7 Hill (N. Y.) 83; Speckels v. Sax, 1 E. D. Smith (N. Y.) 253; Howard v. Thomas, 12 Ohio St. 201; Brigham v. Rogers, 17 Mass. 571; Renard v. Sampson, 12 N. Y. 561; Ruse v. Mutual B. Life Ins. Co., 23 N. Y. 516; Johnson v. Oppenheim, 55 id. 293. See, also, Carey v. Kreiger, 57 N. Y. Supp. 79; McLean v. Nicol, 43 Minn. 169, 45 N. W. Rep. 15.

²⁹ Michaels v. Fishel, 169 N. Y. 381, 62 N. E. Rep. 425.

³⁰ Clayton v. Greyson, 6 N. & M. 694, 5 A. & E. 302.

³¹ Tudgay v. Sampson, 30 L. T. 262; Clayton v. Greyson, 6 H. & N. 694, 5 A. & E. 302.

³² Hultz v. Wright, 16 S. & R. (Pa.) 345; Lansdale v. Richardson, 1 W. N. C. (Pa.) 413; Wolfe v. Arrott, 109 Pa. St. 473, 16 W. N. C. 565, 33 Pitts. L. J. 427, 1 Atl. Rep. 333.

the consideration for the written lease.³³ Thus, where the lessee accepts a lease of a farm upon the landlord's oral promise that he would build a barn on it by a certain date, the tenant has the right to prove the oral promise to show why he executed the written lease. He may also sue on the oral agreement for damages, though the lease as written contained no provisions respecting the barn.³⁴ But parol evidence is not admissible to show that before the execution of a lease in writing, the landlord promised the tenant that he would put water and gas in the premises during the term. Such an agreement is not a collateral agreement, but is an agreement between the parties to do something directly concerning the premises; it is on the same basis as would be a covenant by the landlord to make repairs.³⁵ On the other hand, a collateral agreement may be shown. Thus, for example, an oral agreement by the landlord to destroy all game on the demised premises, which is collateral to a written lease in which the tenant promises not to kill or destroy game, and in which the right to hunt game on the premises was reserved to the landlord may be proved.³⁶ Under the general rule, parol evidence is always admissible to explain the lease or to correct an error in it, to describe the subject matter and to show facts and circumstances surrounding its execution. Thus, an error in the statement of the rent may be corrected by parol.³⁷ The time when the rent is payable by a written lease may be shown by parol where the lease itself is silent.³⁸ And where there is any indefiniteness as to the premises which are leased, parol evidence may be received to make their description more definite and more certain.³⁹ The character in which the lessee or the lessor signed

³³ As an oral agreement by the lessor to repair. *Clenighan v. McFarland*, 11 N. Y. Supp. 719.

³⁴ *Shughart v. Moore*, 78 Pa. St. 469, 1 W. N. C. 598, 23 Pitts. L. J. 15, 32 L. J. 336.

³⁵ *McLean v. Nicol*, 43 Minn. 169, 45 N. W. Rep. 15.

³⁶ *Morgan v. Griffith*, 40 L. J. Ex. 46, L. R. 6 Ex. 70, 23 L. T. 783, 19 W. R. 957; *Erschine v. Adeane*, *Bennett's Claim*, 42 L. J.

Ch. 849, L. R. 8 Ch. 756, 29 L. T. 234, 21 W. R. 802.

³⁷ *Snyder v. May*, 19 Pa. St. 235. But if the rent is falsely stated in the lease for the purpose of defrauding a stranger to it the real amount cannot be shown by parol as between the parties. *Delamater v. Bush*, 63 Barb. 168.

³⁸ *Hartsell v. Myers*, 57 Misc. 135.

³⁹ *Heyward v. Wilmarth*, 84 N. Y. S. 75, 87 App. Div. 125.

the lease may be explained by parol evidence. Thus, it may be shown that although the lease was signed by an individual, yet it was in fact signed by him on behalf of a partnership of which he was a member.⁴⁰ And where the question is whether a landlord after the expiration of the written lease recognized his tenant as such, parol evidence may be received to show the relations of the parties continued to be the same after the lease as they were before its expiration.⁴¹ It is also competent to prove an oral agreement modifying the lease under seal if the agreement is based on a good consideration, and is not required to be in writing under the statute of frauds.⁴² Thus, it may be proved by parol evidence that the parties to a written lease orally agreed to reduce the rent when the rent as reduced was paid by the tenant and receipted for in full by the landlord.^{42a} Such an agreement is a good defense in a subsequent action by the landlord to recover the amount of rent agreed to be paid by the lease.⁴³ Parol evidence is always admissible to show that a mistake was made in the rent as stated in the lease.⁴⁴ Where the lease provides for a consent by the landlord to some action on the part of the tenant, it is always admissible to prove by parol that the consent was given unless the lease expressly required consent to be in writing.⁴⁵ So, parol evidence may be received to show that the lease was made for illegal purposes,⁴⁶ or to show that the element of fraud entered into its execution, and generally to show that the lease is void and of no effect. Under the rule that parol evidence is receivable to show what property was intended to be included in the lease but not to extend the description it has been held that where the lease was for the "Adam's house, situated on Washington street, Boston," it might be proved what

⁴⁰ *Woolsey v. Henke*, 125 Wis. 134, 103 N. W. Rep. 207.

⁴¹ *Amaden v. Atwood*, 38 Atl. Rep. 263, 69 Vt. 527.

⁴² *Wilgus v. Whitehead*, 8 Pa. St. 131, 6 W. N. C. 537, 26 Pitts. L. J. 202. The question whether there was a parol modification of the lease constituting a new contract is for the jury. *Evers v. Shumaker*, 57 Mo. Ap. 454.

^{42a} *Wilson Gas Company*, 89 Pac. Rep. 897.

⁴³ *McKenzie v. Harrison*, 24 N. E. Rep. 458, 120 N. Y. 260.

⁴⁴ *Sire v. Rumbold*, 39 N. Y. St. Rep. 85, 14 N. Y. Supp. 925.

⁴⁵ *Palmer v. Sanders*, 49 Fed. Rep. 144.

⁴⁶ *Doe v. Allen*, 8 T. R. 148; *Rex v. Northwingfield*, 1 B. & Ad. 912; *Lightfoot v. Tenant*, 1 Bos. & Pul. 555.

the parties intended by these words.⁴⁷ So, where the lease demised "a house and lot containing three acres more or less," and the lessee claiming seven acres, all of which was in one lot not divided by any fences, it was permissible to prove by parol that the original lot connected with the house contained only three acres, and that the lessor had subsequently purchased four acres and occupied the whole tract at the time of the lease and that the lease was intended by the parties to cover only the original three acre lot.⁴⁸ If, however, the description of the lease is intelligible and offers sufficient means of ascertaining exactly what the parties intended to lease, it cannot be extended by parol evidence to include other premises.⁴⁹ On the other hand, parol evidence has been received to show that the cellar of an adjoining house had been occupied by the lessee with the premises to which the lease applied and was necessary for the carrying on of the lessee's business in a case where the question was as to the renewal of the lease.⁵⁰ So, also, where a lessor after the execution of the lease gave a new lease of adjoining lands and agreed to renew this lease, parol evidence was received to show the intention of the parties as to the inclusion of the adjoining land in the renewal lease.⁵¹ So, when there was a clause in a lease "that the lessee is to have all the personal property on the farm," parol evidence was received on the question whether this clause meant that he should have merely the use of such property or that it should be his absolutely.⁵² So, in England, if a party grant a manor by particular name and he has two manors of that name, parol evidence is received to show which of them was meant. So, parol evidence of usage has been received to show that a room which had not been occupied in certain premises did not in fact pass under a demise of these premises

⁴⁷ *Sargent v. Adams*, 3 Gray (Mass.) 72.

⁴⁸ *Chamberlain v. Letson*, 5 N. J. Law, 152.

⁴⁹ *Vose v. Bradstreet*, 27 Me. 156; *Norwood v. Byrd*, 1 Rich. (S. Car.) 135; *Phillips v. Castley*, 40 Ala. 486; *Todd v. Philhower*, 24 N. J. Law, 796; *McLaughlin v. Bishop*, 35 N. J. Law, 512; *Eg-*

gleston v. Bradford, 10 Ohio, 312; *Campbell v. Johnson*, 44 Mo. 247; *Bratton v. Clamson*, 3 Strobb. (S. Car.) 135.

⁵⁰ *Crawford v. Morris*, 5 Gratt. (Va.) 90.

⁵¹ *Midlothian & Co. v. Finney*, 19 Gratt. (Va.) 304.

⁵² *Wing v. Gray*, 36 Vt. 261.

together with all rooms, chambers, and appurtenances thereto belonging.⁵³

§ 301. When parol evidence is not received in the case of leases. In the absence of fraud, accident or mistake evidence of parol agreements made at the time of execution or before the lease was executed, is not admissible to contradict or vary the terms of a written lease.⁵⁴ Thus, as a general rule, parol evidence is not received for the purpose of diminishing the sum agreed to be paid for rent unless in case of accident, fraud or mistake.⁵⁵ So, where there is no ambiguity in the description of the premises comprised in the lease, parol evidence is not received to aid in the construction of the lease.⁵⁶ If the language of the lease is clear and intelligible, parol evidence is rejected. Thus, parol evidence was rejected to show that the lessee explained the meaning of the forfeiture clause to the lessor and that the latter agreed with him in the explanation which he gave.⁵⁷ So, where a lease is silent, it will not be permissible to prove by parol that the lessor stated the house was in good sanitary condition unless the element of fraud or the falsity of statement is involved.⁵⁸ So, where there is an agreement between the lessor and the lessee which is complete and intelligible upon its face, parol evidence will not be received to show that a different agreement was made

⁵³ *Kerslake v. White*, 2 Stark. 508.

⁵⁴ *Snead v. Tietjen* (Ariz.) 24 Pac. Rep. 324; *Cozens v. Stevenson*, 5 S. & R. (Pa.) 421; *Hertzler v. Worman*, 1 W. N. C. (Pa.) 153; *Ker v. Hunt*, 1 W. N. C. (Pa.) 115; *Hood v. McDonald*, 1 W. N. C. (Pa.) 299; *Loley v. Heller*, 1 W. N. C. (Pa.) 613; *Taylor v. Goding* (Mass.) 65 N. E. Rep. 64; *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.) 58; *Butler v. Smith Pharmacy*, 5 N. Y. St. Rep. 825; *Tait's Exr. v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. Rep. 697; *Tyler v. Giesler*, 85 Mo. App. 278; *Brown v. Schiappacassie*, 115 Mich. 47, 72 N. W. Rep. 1096; *Madden v. McKensie* (C. C. A.)

144 Fed. Rep. 64; *McQuire v. Gerstley*, 26 App. Div. 193; *Green v. Dodge* (Vt. 1906) 64 Atl. Rep. 499.

⁵⁵ *William v. Kent*, 67 Md. 350, 10 Atl. Rep. 228; *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.) 58; *Butler v. Smith's Homeopathic Pharmacy*, 5 N. Y. St. Rep. 685; *Taylor v. Goding* (Mass.) 65 N. E. Rep. 64.

⁵⁶ *Ballance v. City of Peoria*, 54 N. E. 428, 180 Ill. 29, 70 Ill. App. 546.

⁵⁷ *Hall v. Phillips*, 164 Pa. St. 494, 30 Atl. Rep. 353.

⁵⁸ *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006.

⁵⁹ *Snowhill v. Reed*, 49 N. J. L. 292, 10 Atl. Rep. 737.

which was not included in the lease.⁵⁹ Thus, where the lease provided for its surrender upon a certain event happening, it will not be allowable to prove that this contract for a surrender did not contain all the terms which had been agreed upon between the parties. And where the lease is silent the lessee is not permitted to show by parol that at the date of its execution he bought the business carried on by the lessor in the premises, and the lessor agreed not to carry on that business so as to compete with him. Such evidence is not admissible when offered by the lessee in an action against him for the rent though he may recover damages thereon against the lessor in another action.⁶⁰ So, where the lease is silent, parol evidence is not admissible to prove that the landlord had agreed that, in case of the destruction of the premises by fire, the rent should cease where this evidence is offered in an action on an absolute note given for the rent.⁶¹ So, an agreement by the lessor extending the term of the lease and providing that fixtures shall become the property of the landlord which is written on the back of the written lease, cannot be varied by parol.⁶² So, parol proof is not received to show the use to which the landlord said the building was to be put, where the lease itself is silent on this point.⁶³ Parol evidence is inadmissible to contradict an agreement in the lease by which the buildings on the premises were at the date of the expiration of the term to become the property of the lessor.⁶⁴ Parol evidence has been rejected to show that the landlord represented that the premises were in good condition or fit for occupation,⁶⁵ or to show that an assignee of a lessee agreed to pay the accrued rent due by his assignor.⁶⁶ So, where the lease of a coal mine contained no agreement as to how much coal was to be mined, but fixed a certain royalty per bushel, it cannot be shown by parol that the lessee agreed to dig any particular quantity of coal.⁶⁷ The time fixed in the lease for the payment of an instalment of rent cannot be contradicted by parol evi-

⁵⁹ *Scholtz v. Dankert*, 69 Wis. 416, 34 N. W. Rep. 394.

⁶¹ *Stafford v. Staunton*, 88 Ga. 298, 14 S. E. Rep. 479.

⁶² *Walsh v. Martin*, 69 Mich. 29, 37 N. W. Rep. 40.

⁶³ *Bristol Hotel Co. v. Pegram*, 98 N. Y. Supp. 512.

⁶⁴ *Tait's Ex'r v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. Rep. 697.

⁶⁵ *Dutton v. Gerrish*, 9 Cush. (Mass.) 89.

⁶⁶ *Graves v. Porter*, 11 Barb. (N. Y.) 192.

⁶⁷ *Lyon v. Miller*, 24 Pa. St. 392.

dence.⁶⁸ The description of the lease cannot be extended by parol.⁶⁹ Nor can it be shown that the lease was to be commenced at a later date than that specified in it.⁷⁰ And where the tenant alleged that there has been a parol extension of the lease, the burden of proof is upon him to show such an extension.⁷¹

§ 302. **Parol evidence of custom to aid in the construction of a lease.** A lease is always open to explanation by parol as between the parties to it where it is ambiguous or unintelligible, by proof of custom and usage prevalent generally in the country or in the district in which the premises are located. The language of the lease cannot be *varied* by parol proof of custom.⁷² Thus, evidence of custom was rejected where it was offered to prove that a right to the furnishing of steam and forced air passed under the lease as appurtenances.⁷³ In order that the custom shall be received in evidence, it is necessary to show that such custom was general and was known to the parties who contracted in a lease.⁷⁴ Proof of custom is admissible in respect to all matters upon which the parties are silent as to their intention so far as the written lease is concerned.⁷⁵ Thus, proof of custom will be received to show that a crop growing on the land was regarded as personal property and was meant to be reserved to the lessee.⁷⁶ On the other hand, proof of custom prevalent in the vicinity has been received to show that the tenant has a right to remove the crop or fixtures at the end of the term. So, evidence of custom is admissible where a house is let to a tenant at will to show that in such case the lessor attends to the outside repairs, but it is not admissible to prove that the landlord had control of the outer walls, yard and roof of the house.⁷⁷

⁶⁸ Barton v. Dawes, 10 C. B. 261; Mees v. Ansell, 3 Wils. 275; Norton v. Webster, 12 Ad. & El. 442; Hope v. Atkins, 1 Price, 143.

⁶⁹ Carpenter v. Shanklin, 7 Blackf. (Ind.) 308.

⁷⁰ Henson v. Cooper, 3 Scott's N. R. 48.

⁷¹ Lutz v. Wainwright, 44 Atl. Rep. 565, 193 Pa. St. 541.

⁷² Whipple v. Tucker, 123 Ill. App. 223; Werner v. Footman, 51 Ga. 128.

⁷³ Watkins v. Green, 46 Atl. Rep. 38, 22 R. I. 34.

⁷⁴ Whipple v. Tucker, 123 Ill. App. 223.

⁷⁵ Cochrane v. Justice Min. Co., 16 Colo. 415, 26 Pac. Rep. 780; Van Ness v. Pacard, 2 Pet. (U. S.) 137, 148, 7 Law. ed. 374; Duncan v. Blake, 9 Lea (Tenn.) 534, 537.

⁷⁶ Youmans v. Caldwell, 4 Ohio St. 71.

⁷⁷ Shute v. Bills, 191 Mass. 433, 78 N. E. Rep. 96, which was a case

In England, it has been held that where rent has been made payable. "Lady day" parol evidence of custom was received to show what day was meant.⁷⁸ And it has also been held in England that evidence of a custom in a particular trade which was carried on in the premises, might be received to show the length of the term where the lease was silent or ambiguous as to the length of the term.⁷⁹ Thus, where the question was on the obligation of the lessee to pay interest on an instalment of rent, it may be shown that it was the custom of the lessor to receive instalments of rent within ninety days after they had become due.⁸⁰

§ 303. **The modification of the lease by the parties.** A lease, whether in writing or in parol may always be modified as to its terms by the consent of the parties on a good consideration.⁸¹ If the lease is by parol, a modification by parol is unquestionably valid. Where the lease is under seal and the modifying agreement is not, the rule is not so clear. By the ancient common law an instrument under seal could not be modified or discharged except by an instrument of equal solemnity and dignity, i. e., by a writing also under seal. This is still recognized as a valid rule of law in many of the states of the Union so far as writings of a contractual nature, executed under seal are concerned, in which class, leases under seal would be included.⁸² In other jurisdictions, it has been held that a contract in writing, though it was executed under seal may be modified as to any or all of its terms by parol or by a writing without seal if the modifying contract is based upon a valid consideration and is carried into

where it was attempted to hold a landlord liable for injuries arising from a hidden defect on the outside of the house.

⁷⁸ *Doe v. Hall, Benson*, 4 B. & Ald. 588; *Denn d. Peters v. Hopkinson*, 3 D. & R. 507.

⁷⁹ *In re Stroud*, 8 C. B. 502, 503, 19 L. J. C. P. 117; *Brincefield v. Allen* (Tex. Civ. App. 1901), 60 S. W. Rep. 1010.

⁸⁰ *Thomas v. Railway*, 10 Ohio Fed. Dec. 544, 81 Fed. Rep. 911.

⁸¹ *Hanson v. Hellen* (Me. 1886), 6 Atl. Rep. 837.

⁸² In the following cases the rule of the text was applied to leases: *Palmer v. Sanders*, 49 Fed. Rep. 144; *Barnett v. Barnes*, 73 Ill. 216; *Goldsbrough v. Gable*, 36 Ill. App. 363; *Flarsheim v. Dullaghan*, 58 Ill. App. 626; *Volge v. Ronalds*, 83 Hun, 114, 31 N. Y. Supp. 353; *Street R. R. Co. v. Morrison*, *Adams & Allen Co.*, 160 Ill. 280, 303, 43 N. E. Rep. 393; *Knefel v. Daly*, 91 Ill. App. 321.

effect. Where the modifying agreement is by parol, it must be valid under the statute of frauds, or it must be wholly executed, before it will be recognized by the law as a valid modification of the written contract.⁸³

⁸³ The rule of the text was applied to a lease in *Chamberlain v. Iba*, 181 N. Y. 486, 74 N. E. Rep. 481, reversing 87 App. Div. 632, 84 N. Y. Supp. 1120. See, also, *Hastings v. Lovejoy*, 140 Mass. 260, 265, 2 N. E. Rep. 776, 54 Am. Rep. 762; *Munroe v. Perkins*, 9 Pick. (Mass.) 298; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Blasdell v. Souther*, 6 Gray (Mass.) 149. For the application of the rule to leases see *Hyler v. Humble*, 101 Ind. 38; *Prior v. Kiso*, 81 Mo. 241; *Evers v. Shumaker*, 57 Mo. App. 454; *Horgan v. Krumweide*, 25 Hun, 116; *McKenzie v. Harrison*, 120 N. Y. 260, 263, 24 N. E. Rep. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638. "The reason of the rule was founded upon public policy. It was not regarded as safe or prudent to permit the contract of parties which

had been carefully reduced to writing and executed under seal to be modified or changed by the testimony of witnesses as to the parol statements or agreements of parties. Hence the rule that testimony of parol agreements shall not be competent as evidence to impeach, vary or modify written agreements or covenants under seal. But the parties may waive this rule and carry out and perform the agreements under seal as changed or modified by the parol agreement, thus executing both agreements, and when this has been done and the parties have settled with a full knowledge of the facts, and in the absence of fraud, there is no power to revoke or remedy reserved to either party." By the court in *McKenzie v. Harrison*, 120 N. Y. 260, on pp. 263, 264.

CHAPTER XIII.

FRAUD AND DURESS IN PROCURING THE LEASE.

- § 304. General rules as to duress and fraud in relation to contracts.
- 305. The effect of delay.
- 306. Fraud in the procurement of a lease.
- 307. The cancellation of the lease for duress or inadequacy of the consideration.
- 308. Leases between persons occupying confidential relations with the lessee.
- 309. The elements which must co-exist in the case of fraud.
- 310. The fraud of the tenant.
- 311. The tenant who has been defrauded need not abandon the premises.

§ 304. General rules as to duress and fraud in relation to contracts. The fact that the execution of a contract is procured by duress or fraud may be used as a defense in an action at law brought by the party who has been guilty of the fraud or duress, or it may furnish the basis of a suit in equity brought by the party who has executed the contract to set it aside. Duress by threats must be of such a character as to create in the person upon whom it is practiced a fear of some grievous wrong or of great bodily harm or of unlawful arrest or imprisonment. The threats must be of such a character as would be likely to overcome a person of average firmness of mind. A threat to do some act which is lawful to be done, as for example, a threat to sue, or to attach property, or to arrest a person in a civil proceeding does not necessarily amount to duress. On the other hand, a threat to make an unlawful arrest and to put the person threatened in jail, or to keep him in imprisonment unlawfully, constitutes duress where the person thus threatened by weakness of mind or body or by reason of ignorance of his rights executes a contract. So, too, though a person is arrested by a legal process, it is a clear case of duress if the arrest by legal process is employed for, and results in the procuring of an execution of the contract by the person arrested which he would not have

executed if he had not been arrested. But, duress may, and usually does occur under circumstances where no arrest is imminent or threatened. The case of the procuring of a contract by threats of grievous harm made to a person of weak mind would be an example of duress. The rules above stated are applicable to contracts of all sorts and hence may be applied to leases. We are, however, without very many cases in the books or in the reports where leases have been actually procured by duress but where such cases exist the cases cited under the following sections may be of service.

§ 305. **The effect of delay.** If a lessee desires to avoid or rescind a lease for fraud or misrepresentation or for a mutual mistake, he must, upon his discovery of the facts, act promptly. He should notify the other party of his purpose and intention and having done this, he must adhere to his purpose. By remaining silent and treating the lease as valid after he has discovered the fraud or mistake, it will be presumed that he has waived his rights; he will thereby be bound by the lease to the same extent as though no fraud or mistake had occurred.¹ The failure of the lessee for an unreasonable period to bring a suit to rescind the lease after he has discovered the fraud which has been committed by the lessor, is an election by the lessee to continue the lease; he will therefore be liable to his lessor on the covenant for rent and on all other covenants, though he has an action at law against his lessor for damages for deceit.² A lessee, who in equity demands the cancellation of his lease should either promptly surrender possession or tender a surrender to his lessor, and having surrendered possession, he will be compelled to continue out of possession. Thus, a lessee who surrendered possession of the premises because they were out of repair and uninhabitable, loses all rights to have his lease rescinded in equity because of the landlord's fraud where, after having left the premises, he re-enters upon them and continues to hold them.³ The unreasonable delay of the tenant in asking equity to rescind the lease

¹ *Grymes v. Sanders*, 93 U. S. 55, 23 Law. Ed. 798; *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. Rep. 399; *Commissioner v. Younger*, 29 Cal. 177; *Ginch v. Causey* (Va. 1907), 57 S. E. Rep. 562; *Bell v.*

Baker, 43 Minn. 86, 44 N. W. Rep. 676.

² *Little v. Dyer*, 35 Ill. App. 85.

³ *Blake v. Dick*, 15 Mont. 236, 38 Pac. Rep. 1072.

will be laches and will defeat his suit. It is for the court to determine upon all the facts of each case what delay is unreasonable.⁴ In one case it was said that a rescission or an attempt to rescind a lease made a month after the tenant had entered upon the premises was in season, though he had ascertained the facts, showing the falsity of his landlord's statements as to the condition of the premises immediately after taking possession; this would be the case where the tenant was free from delay in notifying his landlord.⁵ A tenant, who after he has discovered the fraud of his landlord in procuring him to execute a lease, continues in the possession of the premises and pays rent regularly during the greater portion of the term, is thereby barred from alleging or proving that the execution of the lease was procured by fraud where his landlord sues to recover rent for the remainder of his term.⁶ The defense that a lease was obtained by duress interposed by a tenant has no merit where it appears he has held over after the expiration of the term. If the execution was in fact under duress by the lessor, the lessee is conclusively estopped to plead it by his acceptance of the possession and by holding over after the term is ended. In such a case the lessor might have disregarded the lease altogether and sued for use and occupation for which in fairness and equity the lessee is bound to pay.⁷

§ 306. **Fraud in the procurement of a lease.** A lease like every other contract, is voidable for fraud in its procurement.⁸

⁴ *Barker v. Fitzgerald*, 68 N. E. 430, 204 Ill. 325.

⁵ *Cunningham v. Wathen*, 43 N. Y. Supp. 886.

⁶ *Bell v. Baker*, 44 N. W. Rep. 676, 43 Minn. 86.

⁷ *Andrew v. Carlile*, 4 Colo. App. 326, 36 Pac. Rep. 66, 67. The tenant who alleges fraud in the procurement of a lease as a set off or defense in an action to recover the rent has the burden of proof. He must allege the fraud specifically and also where he alleges false representations that they were made with an intent to deceive him and that he was de-

ceived thereby. He must also allege and prove that the lessor knew the representations were false. *Bauer v. Taylor*, 4 Neb. (Unof.) 701, 96 N. W. Rep. 268. A defense in an action by the landlord for his rent that the lease was obtained by duress is not sustained by proof that the landlord told the tenant he must pay rent or vacate, particularly as there is no allegation or proof that the tenant did not understand the terms of the lease which he executed. *Andrew v. Carlile*, 4 Colo. App. 326, 36 Pac. Rep. 66.

⁸ As to leases, see *Haines v.*

So, a lease which has been obtained by fraud and circumvention from a landlord who, when he executed it, was in a state of intoxication, is void.⁹ The presumption, however, is always in favor of the good faith of the lease. The parties will be presumed to have been competent to contract and the lease will be presumed to be free from fraud in the absence of any evidence to the contrary. It will be presumed that the landlord spoke the truth as to the condition of the premises and as to the rent which he was receiving for their use. In order to persuade a court of equity to set aside a lease for fraud, there must be satisfactory evidence of fraud. Proof beyond a reasonable doubt is not required but in every case the proof must be such that it shall create something more than a mere probability that fraud was employed in procuring the lease or that the landlord spoke falsely.¹⁰ The party to the lease alleging fraud has the burden of proof and fraud must always be shown by clear and satisfactory evidence.¹¹ What in any case shall constitute fraud which will justify the rescission of the lease depends in all cases upon the peculiar facts and circumstances of each case. Merely misrepresenting the legal effect of the language of a written lease is not fraud.^{11a} Fraud in procuring the execution of a lease may be committed by either party. It is fraud in the lessee, justifying the rescission of a lease by the lessor for the lessee to state falsely that he is solvent, has paid his rent promptly to other landlords and has considerable personal property which he will pledge as security for the rent,¹² or for a lessee to misrepresent

Downey, 86 Ill. App. 373; Fry v. Day, 97 Ind. 348; Martin v. Davis, 96 Iowa, 718, 720, 65 N. W. Rep. 1001; Ball v. Lively, 4 Dana (Ky.) 369; Christie v. Blakeley (Pa. 1888), 15 Atl. Rep. 874; Lock v. Frasher's Adm'r, 79 Va. 409; Hurlihan v. Seckendorf, 18 N. Y. Supp. 756, 46 N. Y. St. Rep. 301; Pursel v. Teller, 10 Colo. App. 488, 51 Pac. Rep. 436; Powell v. F. C. Linde Co., 64 N. Y. Supp. 153; Haines v. Downey, 86 Ill. App. 373; Cunningham v. Wathen, 43 N. Y. Supp. 886, 14 App. Div. 553; Newcome v. Emery (Ky.), 42 S.

W. Rep. 105; Lynch v. Sauer, 37 N. Y. Supp. 666, 13 Misc. Rep. 1.

⁹ Butler v. Mulvihill, 1 Bligh. 137.

¹⁰ Smith v. Collins (Ala.), 41 So. Rep. 825; Abel v. Collins (Ala.), 41 So. Rep. 826.

¹¹ Wolfe v. Arrott, 109 Pa. St. 473, 1 Atl. Rep. 333; Ringle v. Quigg (Kan. 1906), 87 Pac. Rep. 724.

^{11a} Fry v. Day, 97 Ind. 348, 350, in which the lessee told the lessor that the lease was a receipt and he signed it in that belief.

¹² Martin v. Davis, 96 Iowa, 718, 720, 65 N. W. Rep. 1001.

the terms of a lease to his lessor who cannot read.^{12a} But mere promises by the lessee that he will do something in the future by reason of which the lease is executed by the lessor is not fraud. Thus statements by the lessees that a corporation was soon to be formed in which they would be interested and that operations on the demised premises would be begun at once do not constitute fraud.¹³ Fraud by the lessor is more often met with than fraud by the lessee. The lessor's fraud may consist in a wilful misrepresentation of the condition of the premises in some material respect and with knowledge that he is speaking falsely.¹⁴

§ 307. **The cancellation of the lease for duress or inadequacy of the consideration.** A lease will be cancelled in equity upon the suit of either party to it for inadequacy of consideration. But mere inadequacy of consideration alone will not justify a court of equity in cancelling the lease unless the inadequacy is so great as to furnish some indication of fraud on the part of the party against whom the action is brought.¹⁵ For an owner of land has an absolute right to lease it for any consideration which may be satisfactory to him, however small. Hence, it follows that the smallness of the rent in comparison to the rental value of the land will not alone justify the landlord in having a lease set aside although this may be a fact to be considered. The landlord must tender, or offer to tender, and pay into court what he has received upon the lease where he moves in equity to set aside a lease because it was obtained by collusion between the tenant and the agent of the landlord for an inadequate con-

^{12a} *Christie v. Blakeley* (Pa. 1888), 15 Atl. Rep. 874.

¹³ *Love v. Teter*, 24 W. Va. 741.

¹⁴ *Supra*, § 306. *Wolfe v. Arrott*, 109 Pa. St. 473, 478, 1 Atl. Rep. 333. "The power to cancel a contract is a most extraordinary power. It is one which shall be exercised with great caution—nay I may say with great reluctance—unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length

of the chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the interests of the country. In general, the parties must look out for themselves." *Colton v. Stanford*, 82 Cal. 398, 23 Pac. Rep. 28, 16 Am. St. Rep. 137, quoted with approval in *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. Rep. 899.

¹⁵ *Smith v. Collins* (Ala.), 41 So. Rep. 825.

sideration.¹⁶ In determining the inadequacy of rent or other consideration proceeding from a lessee in a case where it is attempted by a lessor to set it aside for fraud, the court may consider the value of the land in the open market and also what it would rent for, or if it is cultivated farm land, what crops it would produce. The inadequacy of the rent which is to be paid in cash in proportion to the actual rental value of the land or of similar land in its neighborhood is relevant. The character, occupation and financial standing of the lessee and his ability to perform his covenants may also be considered. Thus a covenant by him to pay taxes and keep fences in repair and to make certain specified improvements will certainly not augment the consideration where the lessee is insolvent. And while the covenants of a responsible and solvent lessee to make substantial improvements on the premises which are to become the property of the lessor may be evidence showing a valuable consideration, a covenant of such a lessee to make trivial repairs adds very little to the benefit the lessor will receive.¹⁷ A lease may be cancelled in equity or reformed for a mistake made in its terms, but a lease will not be reformed for mistake as to the amount of rent which is to be paid thereunder unless it shall appear to the satisfaction of the court that the mistake was mutual. This is the general rule, but it has been held that a court of equity will not allow the intending lessee to take advantage of the lessor in stating the rent in an agreement for a lease and compel the lessor to insert the mistaken rent in the lease. Thus, where the parties to the lease signed an agreement to make a lease at a certain fixed rent, and the lease, when it was executed by them by mistake of the lessor stated a much lower rate of rent, the court assumed that the lessee had noticed the mistake and had kept silence with the intention of gaining an undue advantage over the lessor on account of the error. In this case it was held that although the lessor was not entitled to have the lease reformed in equity because the mistake was not a mutual mistake yet, the lessee not being without fault though innocent of any fraud, should be compelled to take a lease with the correct rent stated in it, but he might, if he did not care to do this, surrender the premises upon paying the lessor for their use and occupation for the pe-

¹⁶ *Abingdon v. Butler*, 2 Cox, 260, ¹⁷ *Dickson v. Kempinsky*, 96
3 Bro. C. C. 112, 1 Ves. Jun. 206. Mo. 252, 9 S. W. Rep. 618, 621.

riod he had been in possession of them at the rate of rent stated in the agreement for the lease.¹⁸ So, where a mistake in stating the rent in a lease did not appear to be mutual but the lessee had accepted the lease with the knowledge of the mistake the reformation of the lease was denied, though the court directed the lease and the agreement for the lease to be delivered up and cancelled.¹⁹ Under certain circumstances and particularly where equitable remedies are recognized in a court of law, the lessee may be granted a reformation of the lease in an action against him for the rent. This rule was laid down in a case where, through a mistake in drawing the lease, a covenant by the lessor to make repairs was omitted, and the lessee having made repairs endeavored to off-set his damages in an action against him for the rent due in his covenant.²⁰ The fact that premises had always been leased for a larger rent than is named in the lease and that a tenant is a complete stranger to the landlord at the date of the execution of the lease is strong corroboration of the evidence of a landlord that the rent reserved in a written lease was understated by a mutual mistake of the parties.²¹

§ 308. **Leases between persons occupying confidential relations with the lessee.** Leases, the parties to which stand in confidential relations to each other, like other contracts between such persons, are regarded with careful scrutiny by the courts. The mere fact of the confidential relationship may not alone subject a lease to suspicion. Hence, it follows that leases, the parties to which stand in the relation of principal and agent; attorney and client; trustee and beneficiary, and the like, are not in themselves invalid. Thus, the agent may as lessee take a lease from his principal if he shall prove that the lease was made after the principal had received from the agent full knowledge of all the circumstances relating to it and that the lease was entered into in perfect good faith.²² But a lease which is procured by an agent or an attorney to himself as lessee for an inadequate consideration, and particularly where the lessor is in embarrassed circumstances, may be rescinded if the circum-

¹⁸ Garrard v. Frankel, 30 Beav. 445, 31 L. J. Ch. 604, 8 Jur. (N. S.) 985.

¹⁹ Gun v. McCarthy, 13 L. R. Ir. 304.

²⁰ Thomas v. Conrad, 24 Ky. Law Rep. 1630, 71 S. W. 903.

²¹ Garrard v. Frankel, 30 Beav. 445, 451, 31 L. J. Ch. 604, 8 Jur. (N. S.) 985.

²² Molony v. Kernan, 2 Dr. & War. 31.

stances are such that duress or fraud may reasonably be inferred. In the case of a confidential relationship between the lessor and the lessee a lower degree of proof of fraud or duress is required than in ordinary circumstances.²³ If the whole lease is tainted with fraud, duress, or undue influence it may be wholly set aside and cancelled; but if it appears from the evidence that a portion of it only is the result of fraud the lessee may have a reformation of the lease as to the portion which is fraudulent. Thus, where a landlord who was not accustomed to transacting business agreed with a professional friend that he would let his friend have a part of the premises owned by him on a lease and the friend at once drew a lease for a term of five years with a privilege of a renewal for a further term of fifteen years, and which took in a greater tract of land than the owner said he would lease, the lease was reformed in equity as being a fraudulent contract and as procured by an abuse of the confidence which the landlord had in the lessee²⁴ as his friend and adviser.

§ 309. The elements which must co-exist in the case of fraud. In order that a court of equity may be justified in setting aside a lease at the suit of the lessee on the ground that it was obtained by fraudulent representations made by the landlord, it must be shown by clear and convincing evidence; *first*, that the landlord made representations in regard to some material fact in connection with the premises; *second*, that this representation was false; *third*, that the representation was known to be false by the landlord or at least that he had no reasonable grounds for believing it to be true; *fourth*, that the representation was made with the intention on the part of the landlord that it should be believed and acted on by the tenant; *fifth*, that it was acted on by the tenant to his damage; and *sixth*, that in so acting on it the tenant was ignorant of its being false and believed it to be true or had reasonable grounds to believe it to be true.²⁵ The false representation must be as to a material fact. A false repre-

²³ Ward v. Hartpole, 3 Bligh. 470.

²⁴ Bowen v. Wolff, 23 R. I. 56, 49 Atl. Rep. 395.

²⁵ Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. Rep. 899, 901,

quoting Southern Development Co. v. Silver, 125 U. S. 250, 8 Sup. Ct. 881, 31 Law ed. 678; Bayles v. Clark, 100 N. Y. Supp. 586; Haines v. Downey, 86 Ill. App. 373.

sensation as to some collateral or independent fact which has no bearing on the procurement of the lease, will not justify a finding of fraud. The representation is material as regards the question of fraud, when it is of such a character that, if it had not been made, the lease would not have been entered into. But though the misrepresentation which is used as a basis for a charge of fraud must be material it need not have been the sole cause of the making of the lease, though it must always be of such a nature, weight and force that the court can fairly say without this representation the lease would not have been entered into by the other party.²⁶ If the landlord for the purpose of inducing the making of the lease states of his personal knowledge that a material fact in relation to the condition of the premises does or does not exist, without having knowledge whether his statement is true or false, and without having reasonable grounds to believe it to be true, he is liable for fraud, if the lessee relies upon his statement and it is subsequently found to be false, though the landlord did not actually know the statement was untrue.²⁷ If the lessor has knowledge of defects in the premises which are not discoverable by the tenant upon practical examination, and which will imperil his person or property a liability arises from the fraudulent concealment of such defects and, in the application of this rule, the terms fraud, fraudulent concealment, constructive fraud and deceit are synonymous.²⁸ Thus, for example a wilful misrepresentation of the condition of the premises by the lessor in some material respect and with a knowledge on his part that he is speaking falsely is sufficient.²⁹ But a landlord cannot be held to be guilty of fraud in procuring the execution of a lease where he remains silent as to the condition of the buildings.³⁰ The tenant must investigate for himself. He is put upon inquiry as to those matters in relation to the premises upon which he can inform himself by the use of ordinary diligence and care and, as to such matters, the silence of the landlord raises no presump-

²⁶ Colton v. Stafford, 82 Cal. 399,
23 Pac. Rep. 28, 16 Am. St. Rep.
137.

²⁷ Daly v. Wise, 132 N. Y. 306,
30 N. E. Rep. 837, 16 L. R. A. 236;
Prahaz v. Tousey, 93 App. Div.
507, 87 N. Y. Supp. 845; Haines
v. Downey, 86 Ill. App. 373.

²⁸ Shinkle v. Birney, 68 Ohio
St. 328, 334, 67 N. E. Rep. 715.

²⁹ Wolfe v. Arrott, 109 Pa. St.
473, 478, 1 Atl. Rep. 333.

³⁰ Blake v. Dick, 15 Mont. 236,
241, 38 Pac. Rep. 1072, 48 Am. St.
Rep. 671.

tion of fraud.³¹ Thus, where the tenant inspects the buildings before he leases it the silence of the landlord as to the fact that the cellar is liable to become flooded in case of rain does not constitute fraud on the part of the landlord.³² But where the landlord knows the use to which the building is to be put by the tenant, and knows a secret defect in the building which renders it unfit for this use, and he fraudulently conceals that defect the tenant may obtain a rescission of the lease for fraud.³³ The lessor who makes any statement which is material to the premises in question, aside from a mere expression of his opinion, is bound to speak the truth. If he makes any statement as to the condition of the premises at the time of the execution of the lease which is an inducement leading the lessee to execute the lease he must speak the truth or take the consequences of his misrepresenta-

³¹ *Schermerhorn v. Gouge*, 13 Abb. New Cases (N. Y.) 315; *Keates v. Cadogan*, 10 C. B. 591, 70 E. C. L. 591.

³² *Blake v. Dick*, 15 Mont. 236, 38 Pac. Rep. 1072.

³³ *Haines v. Downey*, 86 Ill. App. 373; *Bauer v. Taylor*, 4 Neb. (Unof.) 710, 98 N. W. Rep. 29, modifying 96 N. W. Rep. 268; *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122; *Cesar v. Karutz*, 60 N. Y. 229; *Myers v. Rosenback*, 25 N. Y. Supp. 521, 5 Misc. Rep. 337, 11 Misc. Rep. 116, 31 N. Y. Supp. 993, affirmed in 13 Misc. Rep. 145, 34 N. Y. Supp. 63. See, also, 14 Misc. Rep. 638, 36 N. Y. Supp. 7. In *Milliken v. Thorndike*, 103 Mass. 382, 385, the lessees on saying to the lessor they were not satisfied with the way the store was built, that it had settled and was not safe, were told by him that it was built according to the plans in every particular, which was not true, the drains being improperly placed. The court said by Colt, J.: "It is objected that the evidence did not justify this

finding, because it is apparent from the subject-matter, that the representation made was intended, and should have been understood by the defendants, as only an expression of a strong belief. If a statement is honestly made as a matter of opinion, judgment or estimate it is not in law a false representation, though the matter thus stated should turn out to be untrue. But if a fact which is susceptible of knowledge is stated by a party as of his own knowledge, and such representation is relied upon as the basis of a contract, and damage results to the party deceived, it is a legal fraud, the consequences of which must be born by him who makes the statement. The representation in this case was of the latter description. It was of a fact, the existence of which was not open and visible, of which plaintiff (the landlord) had superior means of knowledge and the language in which it was made contains no words of qualification or doubt."

tion.³⁴ So where the lessor tells an incoming lessee that the plumbing in the demised premises is perfect and that they are free from sewer gas and the lessee relying on these promises entered into the lease the tenant may have the lease rescinded for the landlord's fraud.³⁵ So, where a landlord makes a false statement that he has in times past received a certain rental for the premises which is in excess of the rental which the lessee agrees to pay, and the lessee relies on these statements, signs the lease and enters into the premises, he may, when he subsequently finds these statements to be false rescind the lease for fraud.³⁶ But the fact that the landlord's agent falsely stated the amount of rent which the landlord had received and also the quantity of the land which the lease was to include, by reason of which the lessee took the lease at a higher rent, is not sufficient to enable him to defend upon the ground of fraud where he could have easily ascertained the facts in the case.³⁷ So, also, under the rule that the assignee of a lease is chargeable with knowledge of its contents an assignee cannot take advantage of misrepresentation as to its contents made by the assignor, or by the lessor who induced him to take the assignment, or who induced him to take a new lease from the lessor when the lease which has been assigned has expired.³⁸ And the question of the exercise of due diligence by the lessee in examining the premises before he signs the lease is one for the jury to determine upon all the facts.³⁹ So, generally statements by the lessee or by the lessor which are merely in the character of promises without consideration to do something in the future or the opinions upon which the other party had no right to rely do not constitute fraud. Thus, where the landlord represents to the tenant while they were examining the premises that the floor and the light would be all right, and that the light would be sufficient and the rooms comfortable and convenient when certain partitions were removed there is no

³⁴ Haines v. Downey, 86 Ill. App. 373.

³⁵ Pursel v. Teller, 10 Colo. App. 488, 51 Pac. Rep. 436.

³⁶ Powell v. F. C. Lynde Co., 64 N. Y. Supp. 153, 49 App. Div. 286, reversing 60 N. Y. Supp. 1044, 29 Misc. Rep. 419.

³⁷ Merritt v. Dufur, 99 Iowa, 211, 68 N. W. Rep. 553.

³⁸ Powell v. F. C. Linde Co., 29 Misc. Rep. 419, 60 N. Y. S. 1044; Clemens v. Knox, 31 Mo. App. 185.

³⁹ Ladner v. Balsey, 103 Iowa, 674, 72 N. W. 789; Gee v. Moss, 68 Iowa, 318, 27 N. W. Rep. 268.

fraud sufficient to rescind the lease.⁴⁰ So, the landlord of a farm leased for the purpose of raising stock stating that the land would afford sufficient water for the purposes intended by the lessee does not constitute fraud.⁴¹ And, it is not possible for the lessor to obtain cancellation of the lease because one of the several lessees failed to purchase goods from the lessor as the lessees had agreed to do in order to procure the lease.⁴²

§ 310. **The fraud of the tenant.** The landlord may claim fraud or misrepresentation on the part of the tenant in procuring him to execute a lease and he may have the same set aside in equity if he shall prove facts which would enable the tenant to have the lease set aside as against the landlord. Thus, where a lease was drawn by a tenant who, on presenting it to the landlord for his signature, misrepresented its terms on reading it to the landlord who was unable to read, and the landlord relying upon the tenant signed it, he may have it set aside.⁴³ The landlord should act promptly on the discovery of the fraud.⁴⁴ Thus, on the discovery by the lessor that a guarantee which was endorsed on the lease is a forgery committed by the lessee, the landlord may elect either to treat the lease as invalid by reason of the fraud or he may affirm it and sue for the rent.⁴⁵ For he has the same right to elect or affirm the lease as the tenant. If he shall deem it to his interest to disregard the fraud of the tenant and affirm the lease it becomes binding upon him in all respects and the tenant may thereafter enforce any remedies which he may have under the lease against the landlord. The landlord cannot, however, grant a lease for a term under which the tenant enters into possession of the premises and have it set aside for fraudulent statements by the tenant as to matters which were collateral to the lease. Thus, for example, the landlord cannot have the lease set aside because the tenant represents that he is a respectable person and falsely states to the landlord that he means to use the premises to carry on a respectable

⁴⁰ Boyer v. Commercial Building Inv. Co., 110 Iowa, 491, 81 N. W. 720.

⁴¹ Bowen v. Hatch (Tex. Civ. App.), 84 S. W. Rep. 336.

⁴² Hill v. Rudd, 18 Ky. Law Rep. 55, 35 S. W. Rep. 270.

⁴³ Christie v. Blakely (Pa. St.), 15 Atl. Rep. 874.

⁴⁴ Donegal (Marquis) v. Grey, 13 Ir. Eq. R. 12; Davies v. Oliver, 1 Ridgw. P. C. 1; Long v. Fletcher, 2 Eq. Abr. 5.

⁴⁵ Brooks v. Allen, 146 Mass. 201, 202, 15 N. E. Rep. 584.

business even though it appears that the lessee at the date of the execution of the lease intended to use the premises for an immoral and illegal purpose.⁴⁶ But under such circumstances there would be no necessity for the landlord to resort to equity for the rescission of the lease as the contract itself would be void and unenforceable so far as the tenant is concerned because of the immoral use which the tenant would make of the premises.

§ 311. **The tenant who has been defrauded need not abandon the premises.** A tenant who is induced to take a lease by fraud or duress must, as soon as he discovers the fraud, promptly repudiate the lease or surrender or offer to surrender the premises.⁴⁷ He cannot under ordinary circumstances, remain in possession of the premises after he has discovered the fraud and set up the fraud as a defense to an action to recover the rent.⁴⁸ This rule, however, has been sustained in only one or two of the states. In the majority of the states it has been held that a tenant who is induced to make a lease by fraudulent representations is not bound to give up the premises on his discovery of the fraud, but he may retain them and set up his damages resulting from the fraud as a set-off or counterclaim in an action for the rent.⁴⁹ The distinction between the two lines of cases is not a real one and they are by no means inharmonious. The true rule seems to be this, that the fact that the lease was executed or procured by the landlord's fraud or misrepresentation, does not confer a right on the tenant to refuse to pay rent while he occupies the premises; but if he is actually damaged by the fraud, he may elect whether to surrender the premises to the landlord and thus escape all liability for future rent, or he may remain in the premises when he will

⁴⁶ *Feret v. Hill*, 15 C. B. 307, 2 C. L. R. 1366, 23 L. J. C. P. 186, 18 Jur. 1014, 2 W. R. 493.

⁴⁷ *Lynch v. Sauer*, 16 Misc. Rep. 1, 2, 37 N. Y. Supp. 666.

⁴⁸ *Forgotson v. Becker*, 81 N. Y. S. 319; *Powell v. F. C. Linde Co.*, 60 N. Y. Supp. 1044; *Sisson v. Kaper* (Iowa), 75 N. W. Rep. 490.

⁴⁹ *Wolfe v. Arrott*, 109 Pa. St. 473, 1 Atl. Rep. 333; *Myers v. Ros-*

enbuck, 25 N. Y. Supp. 521; *Barr v. Kimball*, 43 Neb. 766, 62 N. W. Rep. 196; *Bauer v. Taylor*, 4 Neb. (Unof.) 701, 96 N. W. Rep. 268, 270; *Dennison v. Grove*, 52 N. J. Law, 144, 19 Atl. Rep. 186; *Whitney v. Allaire*, 4 Denio (N. Y.) 554, affirmed in 1 N. Y. 305. See, also, *Holston v. Noble*, 83 Cal. 7, 23 Pac. Rep. 58.

continue to be bound to pay rent with the right to recover as a set-off the actual damages he may have suffered through the fraud of the landlord.⁵⁰ For the performance and validation of a contract which he had the power to rescind absolutely will not be permitted to work him an injury as he may recover any damages he may have suffered by the landlord by the set-off for the rent or for the injury received by him.⁵¹ It may happen that in restoring the leased premises to the lessor upon the rescission of the lease, it will be impossible to restore them in precisely the same condition they were when delivered to the lessee as none of the tenants who were in the building when it was rented to the lessee are in it when he vacates it and when it is restored to the lessor under the decree of rescission. Changes and alteration may have been made by the lessee during his occupancy, or by a receiver who may have been appointed during the action. And even though there may have been no changes or alterations of this character and no repairs by either party during the occupation of the tenant, there can never be a restoration line for line and corner for corner. The premises will have deteriorated by natural wear and tear and by the decay caused by lapse of time, use and exposure to the elements. There may have been a decline in value or the premises may, for any number of reasons, have become less desirable. So, the character of the purpose for which they may be rented may have materially changed them for the worse. In respect to all these incidents, there cannot be a perfect restoration nor does equity demand it. If a rescission is necessary, it will be ordered if the condition of affairs is such that a substantial restoration can be made.⁵²

⁵⁰ Little v. Dyer, 35 Ill. App. 85; Marcy v. Pierce, 14 Ill. App. 91; Respell v. Carwin, 72 Ill. App. 623; South's Adm'x v. Marcum, 15 Ky. Law, 339, 22 S. W. Rep. 844; Milliken v. Thorndike, 103 Mass. 382, 389; Hall v. Ryder, 152 Mass. 528, 529, 25 N. E. Rep. 970; Bell v. Baker, 43 Minn. 86, 44 N. W. Rep. 676; Rosenbaum v. Gunter, 3 E. D. Smith (N. Y.) 203; McCarty v. Ely, 4 E. D. Smith (N. Y.) 375;

Conklin v. White, 17 Abb. N. Cases, 315; Kierman v. Terry, 26 Oreg. 494, 38 Pac. Rep. 671; Bauer v. Taylor, 96 N. W. Rep. 268.

⁵¹ Irving v. Thomas, 18 Me. 418. See, also, Hall v. Ryder, 152 Mass. 528, 529, 25 N. E. Rep. 970; Pryor v. Foster, 130 N. Y. 171, 29 N. E. Rep. 123.

⁵² Hoops v. Fitzgerald, 204 Ill. 325, 333, 68 N. E. Rep. 430.

CHAPTER XIV.

THE ATTORNMENT OF THE TENANT.

- § 312. Attornment defined
- 313. Payment of rent as constituting attornment.
- 314. The necessity for the landlord's consent to the attornment.
- 315. The effect of the statute of Anne upon attornment.
- 316. The tenant's attorn to a mortgagee or purchaser at foreclosure.
- 317. The statutory rights of the grantee of the reversion.
- 318. The grantee's right to collect rent.
- 319. The extent of the rights of the grantor after his conveyance.
- 320. The obligations of a grantee to tenants in possession.
- 321. The notice to the tenant of the sale of the reversion.
- 322. The effect of a sale of the reversion under a decree or judgment.

§ 312. **Attornment defined.** An attornment is the acknowledgement by a tenant of a new landlord on the alienation of the land and an agreement to become a tenant to the purchaser.¹ Thus, where a sale of the reversion takes place and is brought to the knowledge of the tenant and he by any language or conduct recognizes the title of the purchaser, it is an attornment.² This would be the case where he pays,³ or promises to pay

¹ Whart. Law Dict. 66, 1 Bouv. Law Dict.; *Lindley v. Dakin*, 13 Ind. 388, 389; *Freeman v. Moffit*, 119 Mo. 280, 295, 25 S. W. Rep. 87, 91; *Wilson v. Lyons* (Neb.), 94 N. W. Rep. 636, 637; *Souders v. Vansickle*, 8 N. J. Law, 313, 317. See, also, *Foster v. Morris*, 3 A. K. Marsh. (Ky.) 610, 611, 13 Am. Dec. 205; *Willis v. Moore*, 59 Tex. 636. An attornment does not create a new tenancy, it is merely a continuancy of the former tenancy with a new landlord. *Austin v. Ahearne*, 61 N. Y. 6. By attornment is meant the act of recognition of a new landlord, implying an engagement to pay rent and perform covenants to him. The

word is from the feudal law, where it signifies the transfer, by act of the lord and consent of the tenant, of the homage, fealty, etc., of the tenant to a new lord who had acquired the estate. *Abbott's Law Dictionary*; *Willis v. Moore*, 59 Tex. 636. Attornment is the consent of a tenant to the grant of the landlord; he must be a tenant, and the grant assented to must be that of his landlord; the assent of any stranger is no attornment for want of privity. *Souders v. Vansickle*, 8 N. J. Law, 317.

² *Thompson v. Chapman*, 57 Ga. 16.

³ *Fisher v. Deering*, 60 Ill. 114.

rent ⁴ to the purchaser of the reversion from his landlord.⁵ The distinction between an attornment and a new tenancy is very clear. Where the original landlord transfers his estate in reversion to another and the tenant of the former agrees to hold of the latter, it is an attornment. This is the act of the tenant putting a person in the place of his former landlord, and he continues to hold of his new landlord upon the same terms as he held of the old. But where there is no attornment but a new tenancy, the new lease may, but need not necessarily, vary in its time, rent and conditions from the old lease according to the agreement of the parties.⁶

§ 313. **Payment of rent as constituting attornment.** The payment of rent by a lessee to a grantee of the reversion,^{6a} or to some third person at his direction with his own receipt for the rent,⁷ is an acceptance of the person paying the rent as a tenant and constitutes an attornment under the modern statutes. This is so even though the rent was paid under the threat of a suit and was accompanied by a protest by the tenant and the denial of the right of the grantee to claim the money. Nor can the lessee when paying rent destroy the effect of that act as proof of an attornment by accompanying the payment with a declaration that he does not consider that the relation of landlord exists between him and the payee.⁸ So, the payment of rent under a lease of an easement in a party will by an heir of the lessee after he had come into the possession of the building to which the easement was an appurtenance, is an attornment of the heir to the lessor and creates the relation of landlord and tenant between them. The lessor under the party wall

⁴ *Hayes v. Lawyer*, 83 Ill. 162.

⁵ *Flagg v. Geltmacher*, 98 Ill. 293.

⁶ *Austin v. Ahearne*, 61 N. Y. 6, 16, 17; *Cornish v. Searell*, 8 B. & C. 471, 15 E. C. L. 267. See, also, *Doe v. Edwards*, 5 Ad. & El. 95, 103, 31 E. C. L. 287; *Doe v. Boulter*, 6 Ad. & El. 675, 33 E. C. L. 172; *Doe v. Smith*, 8 Ad. & El. 255, 35 E. C. L. 387; *Tilford v. Fleming*, 64 Pa. St. 309.

^{6a} *McCardell v. Williams*, 19 R.

I. 701, 36 Atl. Rep. 719; *Hayes v. Lawyer*, 83 Ill. 162; *Flagg v. Geltmacher*, 98 Ill. 293; *Border-eaux v. Walker*, 85 Ill. App. 86; *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59; *Cummings v. Smith*, 114 Ill. App. 35; *Hogsett v. Ellis*, 17 Mich. 351; *Mason v. Gray*, 36 Vt. 308, 312.

⁷ *Winestein v. Ziglatski-Marks Co.*, 77 Conn. 404, 59 Atl. Rep. 496.

⁸ *McCardell v. Williams*, 19 R. I. 701, 36 Atl. Rep. 719.

agreement may recover a personal judgment for rent against the heir who has thus attorned.⁹

§ 314. **The necessity for the landlord's consent to the attornment.** At the common law an attornment by the tenant without the knowledge or consent of the landlord was void, and it in no wise affected the right of the landlord against the tenant, or his remedies to recover the rent or to enforce any covenant binding upon the tenant.¹⁰ This rule of the common law is affirmed by statute in many of the states.¹¹ In some instances, statutes have been enacted which dispense with the consent of the landlord where the attornment is made to one who purchases at a sale made under a judgment at law or a decree in equity, or to a mortgagee after forfeiture.¹² The common law doctrine of attornment is not enforced in Minnesota.¹³ An attornment without the consent of the landlord to one holding a tax title is not valid, and the occupation of the tenant under a lease from the owner of the tax title does not constitute adverse possession against the landlord.¹⁴ Where, after an attornment which is void because it was made without the consent of the landlord, there is no disclaimer of the landlord's title by the tenant brought to the knowledge of his landlord or any act of exclusive ownership by the tenant calculated to apprise him that the tenant is holding adversely for the benefit of a third person, the possession of the tenant is not adverse to that of the true owner.¹⁵ A tenant who has attorned to a purchaser on an execution sale when the execution deed was found to be void, may state the claim of his original landlord in an action

⁹ Mackin v. Haven, 187 Ill. 480, 58 N. E. Rep. 448, affirming 88 Ill. App. 434.

¹⁰ Perkins v. Potts, 52 Neb. 110, 71 N. W. Rep. 1017; O'Donnell v. McIntyre, 118 N. Y. 156, 23 N. E. Rep. 455; Benoist v. Rothschild, 145 Mo. 399, 46 S. W. Rep. 1081, McCartney v. Auer, 50 Mo. 395; Dausch v. Crane, 109 Mo. 323, 19 S. W. Rep. 61; Pierce v. Rollins, 60 Mo. App. 497.

¹¹ Ratcliff v. Bellfont Iron Works, 87 Ky. 559, 10 S. W. Rep. 365.

¹² O'Donnell v. McIntyre, 118 N. Y. 156, 23 N. E. Rep. 455, holding that such a statute does not apply to an attornment to one who claims under a tax deed.

¹³ Jones v. Rigby, 41 Minn. 530, 43 N. W. Rep. 390.

¹⁴ Kipley v. Sculley, 185 Ill. 52, 57 N. E. Rep. 187; O'Donnell v. McIntyre, 118 N. Y. 156, 37 Hun, 623.

¹⁵ Benoist v. Rothschild, 145 Mo. 397, 46 S. W. Rep. 1081.

brought by the purchaser to recover rent under the lease. If he shall show that the deed is void, the action to recover rent must be dismissed.¹⁶

§ 315. **The effect of the statute of Anne upon attornment.** The act of attornment by the tenant to his new lord was of a public nature being customarily performed by some symbolic ceremony in the presence of the tenants upon the estate of the former landlord. The general effect of this ceremony was to express a renunciation of the tenant's allegiance and service to the former landlord and his proffer of service and allegiance to him to whom the former owner had conveyed the reversion. This at first and for many centuries was a voluntary act upon the part of the tenant, it being according to feudal principles, an absolute right of a terre tenant to select his lord on account of the frequent personal services he was bound to render him, and the protection and aid of a personal and feudal character which the landlord under the feudal system was obligated to render to his tenants when called upon by them to do so. On account of reasons arising out of the principles of the feudal tenure of land, it was not regarded as just and fair to the tenant who has entered in relations with a superior lord of his own choosing, to have his duties and obligations to this superior transferred to another who might be a stranger, and indeed an enemy, without the consent of the tenant. Hence, unless the tenant formally attorned to the party to whom the reversion had been transferred, he owed him no duty either to pay rent, to render him any service specified in the lease or by the law of the land, or to perform any of the covenants of the lease whatever. This rule of the ancient law formed a most serious impediment to the free commerce of land, and, for that reason, after the abrogation of the rules of the feudal system had taken place, it was abolished by statute in England in the time of Anne.¹⁷ In some of the states the abrogation of the common law

¹⁶ Ross v. Kernan, 31 Hun, 164.

¹⁷ Doe d. Agar v. Brown, 2 El. & Bl. 331, 22 L. J. Q. B. 432; Vigers v. St. Paul's (Dean & Chapter), 14 Q. B. 909, 19 L. J. Q. B. 84, 14 Jur. 1017, Ex. Ch. Williams v. Hayward, 1 El. & El. 1040, 28 L. J. Q. B. 374, 5 Jur. (N. S.) 1417, 7

W. R. 563. As to similar statutes in America, see McDonald v. Hanlon, 79 Cal. 442, 443, 21 Pac. Rep. 861 (Civil Code, § 1111); Coker v. Pearsall, 6 Ala. 542, 543; Otis v. McMillan, 70 Ala. 46, 53; Doe v. Clayton, 73 Ala. 359, 361; Houston v. Farriss, 71 Ala. 570; Drey-

requirement of an attornment is the result rather of implication arising from the statute than from an express enactment. Thus it has been held that a statute giving grantees, assignees, heirs and representatives of lessors the same remedies or rights against tenants as the lessors by implication dispenses with an attornment.¹⁸ Where an attornment is no longer necessary a privity of estate, but not of contract, arises between the grantee of the lessor and the lessee as soon as the grantee acquires the title, and the former can thereafter maintain an action of debt, but not upon a covenant, against the lessee under a lease which was outstanding where the covenant does not expressly run with the land.¹⁹

§ 316. **The tenant's attorn to a mortgagee or purchaser at foreclosure.** The act of a tenant whose lease is subsequent to the mortgage in paying rent to the mortgagee upon his entry on a breach of condition is an attornment by the tenant. As soon as the mortgagee has received the rent from a tenant in possession, the relation of landlord and tenant exists between the parties though prior to that the mortgagee might treat the tenant as a trespasser.²⁰ The mortgagor having conveyed his whole interest in the premises to the mortgagee, to which his subsequent lease is, of course, subordinate, forfeits the whole

fus v. Hirt, 82 Cal. 621, 23 Pac. Rep. 193; *Baldwin v. Walker*, 21 Conn. 168; *Lindley v. Dakin*, 13 Ind. 388, 389; *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. Rep. 31; *Foster v. Morris*, 3 A. K. Marsh. (Ky.) 611; *Punk's Lessee v. Kincaid*, 5 Md. 404; *Keay v. Goodwin*, 16 Mass. 1; *Farley v. Thompson*, 15 Mass. 18; *Burden v. Thayer*, 3 Pick. (Mass.) 76; *Jones v. Rigby*, 41 Minn. 530, 43 N. W. Rep. 390; *Hendrickson v. Beeson*, 21 Neb. 61, 63, 31 N. W. Rep. 266; *Gribble v. Toms*, 71 N. J. Law, 338, 57 Atl. Rep. 144, 145; *Tilford v. Fleming*, 64 Pa. St. 301. But see *contra* where it was held that a purchaser cannot recover rent and possession as a landlord unless he avers and proves an at-

torment. *Duke v. Compton*, 49 Mo. App. 304.

¹⁸ *Howland v. White*, 48 Ill. App. 236 (Rev. St. c. 80, § 14); *Thomasson v. Wilson*, 146 Ill. 384, 34 N. E. Rep. 432; *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. Rep. 31, affirming 66 Ill. App. 282, and construing Rev. St. c. 80, § 14 (2 Starr & C. Ann. St. (2d ed.) p. 1497; *Bordereaux v. Walker*, 85 Ill. App. 86.

¹⁹ *State v. Idler*, 54 N. J. Law, 467, 24 Atl. Rep. 554.

²⁰ *Gartside v. Outley*, 58 Ill. 210, 215, 11 Am. Rep. 59; *Hogsett v. Ellis*, 17 Mich. 351; *Kimball v. Lockwood*, 6 R. I. 138, 139; *Mason v. Gray*, 36 Vt. 308, 312; *Evans v. Elliott*, 9 Ad. & El. 159.

title at law by default in paying the debt for which the mortgage is security, and unless forbidden by statute, as is the case in some states, the tenant may at once attorn to the mortgagee without disloyalty to his landlord as he thereby only recognizes a title which his landlord has created.²¹ The payment of rent by the tenant to the mortgagee with or without a promise to pay that which subsequently accrues is usually a sufficient attornment and the tenant is thereafter liable for the rent to the mortgagee or his grantee alone and cannot be compelled to pay it to the mortgagor.²² Not only may a tenant attorn to a mortgagee, but in some of the states it is by statute expressly provided that he may, and in some that he must attorn to a purchaser of an equity of redemption on a sale in foreclosure.²³ The purpose of these statutes is first to secure to the purchaser at foreclosure, the rents and profits of the property he has bought without the cost and annoyance of an action in ejectment and second, to enable the tenant to continue his possession by attorning to the new owner. They ought therefore, to be so construed as to carry out this purpose. An attornment of a tenant to a mortgagee, before the expiration of the mortgagor's right to redeem after foreclosure, is invalid by statute in many of the states.²⁴ A tenant may attorn to a grantee under a deed made on a conveyance at a tax sale. If the deed is regular on its face, his attornment is good though the conveyance is void-

²¹ Kimball v. Lockwood, 6 R. I. 138, 139; Jones v. Clark, 20 Johns. (N. Y.) 51; Evans v. Elliot, 9 Ad. & El. 159, also holding that an attornment does not relate back to a prior notice to quit given by a mortgagee to the tenant, but creates a privity and right to collect rent in the mortgagee only from the date it is actually made.

²² Kimball v. Lockwood, 6 R. I. 138, 140.

²³ Freeman v. Moffitt, 119 Mo. 280, 295, 25 S. W. Rep. 87; Pierce v. Rollins, 1 Mo. App. Rep. 217; Conley v. Schiller, 24 N. Y. Supp. 473; Ratcliff v. Belfont Iron Works Co., 87 Ky. 559, 10 S. W. Rep. 365. A lessee of a purchaser in fore-

closure may legally attorn to a purchaser in a subsequent sale at foreclosure of a prior mortgage. Freeman v. Moffitt, 119 Mo. 280, 25 S. W. Rep. 87. The statutes refer only to mortgages given by the landlord or one claiming under him. Pierce v. Rollins, 1 Mo. App. Rep. 217.

²⁴ Mills v. Hamilton, 49 Iowa, 105; Mills v. Heaton, 52 Iowa, 215, 217. *Contra*, Tallman v. Ely, 6 Wis. 244; Gillett v. Eaton, 6 Wis. 244; Hennessy v. Farrell, 20 Wis. 42. After such attornment a former owner who enters is guilty of forcible entry and detainer. Holden B. & L. Ass'n v. Wann, 43 Mo. App. 640.

able on extrinsic evidence.²⁵ The tenant may always show as against his landlord that a third person has obtained a title paramount to the landlord at a tax sale during the term and that he has attorned to such third person when the latter had demanded possession of the premises under his tax deed.²⁶

§ 317. The statutory rights of the grantee of the reversion.

Because of the rule of the common law that a chose in action was not assignable, the grantee of the reversion could not maintain an action against the lessee on a covenant of the lease, though the covenant might run with the land. At common law no one except a person who was a party or a privy to a covenant could sue upon it. The grantor and his heirs, or personal representatives could alone take advantage of a breach of covenant by a lessee.²⁷ This rule so far as it related to landlords and tenants was furthermore based upon that principle or provision of the feudal law which prevented a lord from transferring his lordship without the consent of his vassal, it being considered upon feudal reasons that a vassal or tenant holding under a lord had a vested right to his protection of which he could not be deprived without his consent. This consent was indispensable and was evidenced by the attornment of the tenant by which the tenant admitted he was holding as tenant under the new landlord. The rule was applicable to all leases, whether for life or for years, so that where one purchased the fee with a lease outstanding and the lessee refused to attorn, the conveyance was practically void as to him inasmuch as he could derive no advantage from the covenant to pay rent or from any other covenant in the lease. This very strict restraint upon the alienation of land was removed by various English statutes as the neces-

²⁵ Sheaff v. Husted, 60 Kan. 770, 57 Pac. Rep. 976.

²⁶ Jenkinson v. Winans, 109 Mich. 524, 67 N. W. Rep. 549. The tenant must attorn to a purchaser at the foreclosure sale or he may be removed by a writ of assistance, though his lease be prior in date to a mortgage. Lovett v. German Reformed Church, 9 How. Pr. (N. Y.) 220. The tenant is authorized to attorn to a purchaser under the foreclosure of

a mortgage given by his landlord, and on the proper exposition of the deed, he must do so. This right of the purchaser is not restricted to the case where the former landlord consents. Frank v. Nichols, 6 Mo. App. 72, distinguished. Holden B. & L. Ass'n v. Wann, 43 Mo. App. 640.

²⁷ Co. Litt. 215a; Milnes v. Branch, 5 M. & S. 411; Masury v. Southworth, 9 Ohio St. 340, 346.

sity for transferring land became greater, the most important of which was that of 32 Henry VIII, c. 34, which gave in general to the assignee of the reversion the same rights against the lessee that the lessor had upon all covenants running with the land, while at the same time it gave the tenant the same remedies on such covenants against the grantee of the reversion that he would have had against the grantor. By this statute the privity of contract, together with privity of estate, was transferred to the assignee of the reversion who was thereafter, as respects a lessee, in the same position as the lessor was before his conveyance of the reversion.²⁸ Hence, the grantee of a lessor is entitled under this statute to sue the lessee on all the covenants in the lease. This rule applies where a mortgagor makes a lease and then assigns his equity of redemption.²⁹ But of course, the assignee of a reversion is not entitled under the statute to rent which becomes due prior to the assignment.³⁰ And the statute was construed to include only leases under seal.³¹ The English statute in various forms has been re-enacted in almost all of the American commonwealths.³² In construing these statutes which give the grantee of the lessor the remedies of the lessor, it has been held that a right to enforce a forfeiture for an event which occurred prior to the transfer of the reversion does not

²⁸ *Scaltock v. Heuston*, 1 L. R. C. P. Div. 106; *Masury v. Southworth*, 9 Ohio St. 340, 346; *Shelby v. Hearne*, 6 Serg. (Tenn.) 512.

²⁹ *Cuthberston v. Irving*, 4 H. & N. 742, 28 L. J. Ex. 306, 5 Jur. (N. S.) 740, affirmed 6 H. & N. 135, 29 L. J. Ex. 485, 6 Jur. (N. S.) 1211, 3 L. T. 335. A right to terminate the lease on notice to the tenant with a stipulation that all covenants in the lease shall be binding on the "legal representatives" of the parties confers the right to terminate the lease on notice upon the landlord's grantee. *Adler v. Lowenstein*, 102 N. Y. Supp. 492.

³⁰ *Flight v. Bentley*, 7 Sim. 149, 4 L. J. Ch. 262.

³¹ *Brydges v. Lewis*, 3 Q. B.

603; *Standen v. Christmas*, 10 Q. B. 135; *Smith v. Egginton*, 43 L. J. C. P. 140, L. R. 9 C. P. 145, 30 L. T. 521.

³² *Woodbury v. Butler*, 67 N. H. 545, 38 Atl. Rep. 379 (construing Pub. St. c. 246, sec. 22); *Springer v. Chicago Real Estate Loan & Trust Co.*, 202 Ill. 17, 66 N. E. Rep. 850, affirming 102 Ill. App. 294 (construing 2 Starr & C. Ann. St. 1896, p. 2513); *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. Rep. 454; *Hannigan v. Ingersoll*, 20 Hun (N. Y.) 316; *Zink v. Bohn*, 3 N. Y. Supp. 4; *Wright v. Hardy* (Miss. 1899), 24 So. Rep. 697 (Ann. Code, § 2539, which applies to estates for life or years only, not to estates in fee).

pass to the grantee of the reversion.³³ But a forfeiture of the lease occurring after the conveyance of the reversion may be enforced by the grantee to the same extent as it could have been enforced by the lessor had he continued in possession.³⁴ And the right to possession upon a forfeiture cannot be defeated by a surrender of the lease by the original lessee to the grantor.³⁵ The grantee of a part of a reversion of property which is subject to an outstanding lease is the assignee of the reversion within the statute, 32 Henry VIII, c. 84, and he may under that statute avail himself of a breach of a condition, but the grantee of the whole reversion in a part of the property is not such an assignee, for where the statute speaks of "conferring rights upon grantees and assignees of the reversion" its benefits belong to one who takes an estate for years in the reversion, as well as to one who takes the whole of it. Thus, where a lessor demised three years of his term of twenty-one years to one person and subsequently thereto demised the balance less one day, to another, it was held that the second under-tenant was an assignee under the statute.³⁶ The assignee of a reversion may lose his right to enforce a condition of re-entry by his delay in exercising it.³⁷ It may be noted, however, that the operation of these statutes in placing the assignee of the reversion in the shoes of the assignor and lessor, is confined to those covenants which are contained in the lease and which run with the land. The assignee of the reversion is not subrogated to any rights of the reversioner which are personal to him and collateral to the lease. The remedies of the grantee are those only which the grantor had under the lease and do not enable the grantee to take advantage of a guarantee of the rent signed by a third person and which is contained in a separate instrument.³⁸

³³ *Small v. Clark*, 97 Me. 304, 54 Atl. Rep. 758; *Fenn v. Smart*, 12 East, 444; *Bennett v. Herring*, 3 C. B. (N. S.) 370; *Trask v. Wheeler*, 7 Allen (Mass.) 109; *Rice v. Stone*, 1 Allen (Mass.) 566.

³⁴ *Island Coal Co. v. Combs*, 152 Ind. 379, 53 N. E. Rep. 452; *Metropolitan Land Co. v. Manning* (Mo. App.), 71 S. W. Rep. 696;

Roberts v. McPherson, 63 N. J. Law, 352, 43 Atl. Rpp. 1098.

³⁵ *Page v. Esty*, 54 Me. 319.

³⁶ *Co. Litt.* 215a; *Wright v. Burroughes*, 3 C. B. 685, 4 D. & L. 438, 16 L. J. C. P. 6, 12 Jur. 968.

³⁷ *Gibson v. Doey*, 2 H. & N. 615, 27 L. J. Ex. 37, 6 W. R. 107.

³⁸ *Harbeck v. Sylvester*, 13 Wend. (N. Y.) 608. But see *Allen v. Culver*, 3 Denio (N. Y.)

§ 318. **The grantees right to collect rents.** In modern times in both England and America, by virtue of the statute 32 Henry VIII, c. 34 and similar statutes, a conveyance of the reversion by the owner carries with it, unless expressly reserved by the grantor, the right to collect and sue for all rents which may subsequently accrue and become due under a covenant by a lessee to pay rent to the owner of the premises.³⁹ A conveyance

284. "It follows from these principles that a sale by a lessor of real estate during an unexpired leasehold term, under which a tenant is holding, does not of itself abrogate the lease, determine the leasehold estate, or authorize the landlord or tenant to treat the lease as at an end. Its only effect is to substitute the vendee of the reversion to all the rights of the original lessor, and to transfer to such vendee the fealty and duty to pay rent under the lease, not then matured, which, by the terms of the lease, the tenant had bound himself to pay to the original lessor. The vendee then becomes the landlord by operation of law, whose title the tenant, so long as he remains undisturbed in his possession, may not dispute; and the tenant becomes tenant of the vendee of the reversion, whose right to the possession for the unexpired term the landlord may not gainsay so long as the tenant complies with the terms of the lease. And the same result follows when the sale is made under a mortgage or trust deed, junior to the lease, or under execution, or other similar sale the lien of which is junior to the lease." By the court in *Otis v. McMillan*, 70 Ala. 46, on pp. 53 and 54.

³⁹ *Hand v. Liles*, 56 Ala. 143; *Steed v. Hinson*, 76 Ala. 298; *Wise v. Falkner*, 51 Ala. 359; *Perker-*

son v. Snodgrass, 85 Ala. 137, 140, 4 So. Rep. 752; *Otis v. McMillan*, 70 Ala. 46, 52; *English v. Key*, 39 Ala. 113; *Pope v. Harkins*, 16 Ala. 321; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Mahoney v. Alirso*, 51 Cal. 440; *Clark v. Cobb*, 121 Cal. 595, 54 Pac. Rep. 74, 77; *Peck v. Northrop*, 17 Conn. 217; *Winestein v. Ziglatzki*, 77 Conn. 404, 59 Atl. Rep. 496; *Kennedy v. Kennedy*, 66 Ill. 190, 193; *Neill v. Chesson*, 15 Ill. App. 266; *Disselharst v. Cadogan*, 21 Ill. App. 179, 180; *Crosby v. Loop*, 13 Ill. 625, 627; *Sampson v. Grimes*, 7 Black. (Ind.) 176; *Page v. Lashley*, 15 Ind. 152; *Carley v. Lewis*, 24 Ind. 23; *Indianapolis National Gas Co. v. Pierce*, 25 Ind. App. 116, 56 N. E. Rep. 137; *Welch v. Harton*, 73 Iowa, 250, 34 N. E. Rep. 840; *Van Wagner v. Van Nostrand*, 19 Iowa, 422, 428; *Breeding v. Taylor*, 13 B. Mon. (Ky.) 481; *Winslow v. Rand*, 29 Me. 362, 365; *Gale v. Edwards*, 52 Me. 363, 365; *Montague v. Gay*, 17 Mass. 439, 440; *Burden v. Thayer*, 3 Met. (Mass.) 76, 80, 37 Am. Dec. 117; *Beal v. Boston Car Spring Co.*, 125 Mass. 157, 28 Am. Rep. 216; *Burton v. Richardson*, 10 Allen (Mass.) 260; *Grundin v. Carter*, 99 Mass. 15; *Stevenson v. Hancock*, 72 Mo. 612, 615; *Page v. Culver*, 55 Mo. App. 606; *Hendrickson v. Beason*, 21 Neb. 61, 63, 31 N. W. Rep. 206; *Allen v. Hall*,

by operation of law or under a trust deed or power of sale in a mortgage or by a master or sheriff under a decree or execution that is valid against the lessor, will be as efficacious as a deed from him directly. Whatever unqualifiedly passes his reversion will pass rent thereafter accruing.⁴⁰ Under the modern statutes the grantee of the reversion is entitled to collect subsequently accruing rent from a tenant in possession though the tenant may not have attorned to him.⁴¹ For the fact of an attornment in modern times at least, has lost its ancient importance. Thus, though the tenant has not attorned to the purchaser from the lessor, the latter cannot recover as against the tenant for the use and occupation of the premises by the tenant after the title has passed to the grantee of the lessor.⁴² Under the modern statutes, it is settled that the grantee may sue the tenant in his own name for rent accruing subsequently to the conveyance to him.⁴³ And it has also been held that he may sue in his own name upon collateral security for rent.⁴⁴ In fact, under the modern statute, the rights of the grantee of the reversion after the conveyance to him of the fee are substantially the same as the rights of the grantor so far as the covenants which run with the land are concerned. So, the grantee of land

66 Neb. 84, 92 N. W. Rep. 171; Van Wicklen v. Paulson, 14 Barb. (N. Y.) 654; Pollock v. Cronise, 12 How. Prac. (N. Y.) 363; Ruckman v. Astor, 3 Edw. Ch. (N. Y.) 373; Lewis v. Wilkins, 62 N. Car. 303, 307; Kornegay v. Collier, 65 N. Car. 69, 72; Rogers v. McKenzie, 65 N. Car. 218; Jolly v. Bryan, 86 N. Car. 245; Wilcox v. Donnelly, 90 N. Car. 245; Lancashire v. Mason, 75 N. Car. 455; West Shore Mills Co. v. Edwards, 24 Oreg. 475, 478, 33 Pac. Rep. 987; Duff v. Wilson, 69 Pa. St. 316; Gibbs v. Ross, 2 Head (Tenn.) 437; Hearne v. Lewis, 78 Tex. 276, 14 S. W. Rep. 572; Maxwell v. Urban, 22 Tex. Civ. App. 565, 55 S. W. Rep. 1124; Shaw v. Partridge, 17 Vt. 626; Evans v. Enloe, 70 Wis.

345, 36 N. W. Rep. 22, 23; Winterfield v. Strauss, 24 Wis. 394; Leonard v. Burgess, 16 Wis. 41, 43.

⁴⁰ Disselharst v. Cadogan, 21 Ill. App. 179, 180, also holding that a sale by an officer appointed by the court under a decree in partition, subject to the tenant's rights, is not a reservation of rent, and the purchaser is entitled to collect the rents accruing after the sale.

⁴¹ Tubb v. Fort, 53 Ala. 277; Wise v. Falkner, 51 Ala. 359.

⁴² Blake v. Grammer, 3 Fed. Cas. No. 1,496, 4 Cranch, C. C. 13.

⁴³ Springer v. Chicago Real Estate, etc., Co., 202 Ill. 17, 66 N. E. Rep. 850.

⁴⁴ Allen v. Culver, 3 Den. (N. Y.) 284.

may maintain an action against a tenant whom he found in possession for damages to the land after the grant without an assignment of the cause of action by the grantor.⁴⁵ It has also been held that the statutes are applicable to an assignment of a contract of sale and of a bond for a deed. The vendee is entitled to the rent only from the date he takes title to the demised premises, but if before that date he assigns his contract his right to the subsequently accruing rent passes to the assignee and the latter may enforce his rights against a tenant who is in possession of the premises when he takes title. So, the assignment of a bond for a deed which was made before rent had accrued and which transfers in terms all the right, title and interest of the assignor, carries with it rent which subsequently accrues, but not rent which has accrued, unless an intent to pass such rent be shown fairly.⁴⁶ The assignee of the bond may sue the tenant of the assignor in his own name as soon as notice of the assignment has been given to the tenant.⁴⁷ The statute of Henry VIII, c. 34, is by its terms confined to leases which are under seal. Consequently a lessor may, even though he has assigned his reversion, sue the lessee on his agreement to repair a breach thereof happening subsequent to the assignment.⁴⁸ Hence, it follows that where a lease is not under seal, the assignee of a reversion does not acquire the benefit of the statute, and he cannot maintain an action against the tenant for a breach of the latter's covenant to repair.⁴⁹ Under the statute the assignee of a reversion may generally enforce the tenant's covenant to repair and may sue him in his own name for a breach of the same.⁵⁰ As he may also apparently enforce a for-

⁴⁵ *Shinn v. Guyton & Herrington Mule Co.*, 109 Mo. App. 557, 563, 83 S. W. Rep. 1015.

⁴⁶ *Van Driel v. Rosierz*, 26 Iowa, 575.

⁴⁷ "It is familiar learning, that fealty and rent are incident to the reversion, and passes with it; and by a grant of the reversion the assignee is substituted in place of the lessor, and the rent accruing thereafter is to be paid to him. After the assignment the lessor has no more interest or concern

in the matter than the payee of a promissory note after he has indorsed it." *Lancashire v. Mason*, 75 N. Car. 455, cited with approval in *Otis v. McMillan*, 70 Ala. 46, 53.

⁴⁸ *Bickford v. Parson*, 5 C. B. 921, 17 L. J. C. P. 192, 12 Jur. 377.

⁴⁹ *Standen v. Christmas*, 10 Q. B. 135, 16 L. J. Q. B. 265, 11 Jur. 694.

⁵⁰ *Martyn v. Williams*, 1 H. & N. 817, 26 L. J. Ex. 117, 5 W. R. 351.

feiture arising from a breach of a covenant to repair even where he has not given the tenant notice of the assignment.⁵¹ For this purpose an attornment is not necessary. And where a tenant's covenant to repair is for the benefit of lessors who hold as tenants in common, all the grantees of the several tenants in common must join in the action to recover damages for a breach of reversionment.⁵²

§ 319. **The extent of the rights of the grantor after his conveyance.** Usually a grantor cannot collect rent from his former tenants which has accrued after his sale of the reversion unless he has expressly reserved his right to do so. This he will have to show for the contrary will be presumed. And a grantor who, without having a legal right to do so, collects rent which accrues after he has conveyed, will be liable to his grantee in an action of assumpsit for money had and received to the use of the grantee,⁵³ or the grantee may still maintain an action of debt against the lessee.⁵⁴ The lessor may, of course, grant the reversion, reserving the rent to himself or to another. The reservation of subsequently accruing rent need not be expressed in the deed of conveyance of the reversion. It may be proved by other evidence either parol or written. If the reservation of rent is contained in an instrument other than the deed of conveyance, the instruments may be construed together in order to arrive at the real intention of the parties.⁵⁵ At the common law and before the statute of 32 Henry VIII. c. 34, the grantor could have sued a lessee in debt for the rent which accrued before the grant by reason of the estate created by the possession of the tenant and the receipts of the profits by him. Since the passage of that statute,⁵⁶ the grantor may sue on the covenants to pay rent contained in the existing lease.⁵⁷ He cannot after the title has passed from him sue in assumpsit or for use

⁵¹ *Bennett v. Herring*, 3 C. B. (N. S.) 370, 6 W. R. 37; *Scaltock v. Harston*, 45 L. J. C. P. 125; 1 C. P. D. 106, 34 L. T. 130, 24 W. R. 431.

⁵² *Thompson v. Hakewell*, 19 C. B. (N. S.) 713, 35 L. J. C. P. 18, 11 Jur. (N. S.) 732, 13 L. T. 989, 14 W. R. 11.

⁵³ *Van Wagner v. Van Nostrand*, 19 Iowa, 422, 428.

⁵⁴ *Winslow v. Rand*, 29 Me. 362, 365.

⁵⁵ *Neill v. Chesson*, 15 Ill. App. 266, 267.

⁵⁶ *Thursby v. Plant*, 1 Saund. 240; *Patten v. Deshon*, 1 Gray (Mass.) 325, 327.

⁵⁷ *Crosby v. Loop*, 13 Ill. 625.

and occupation, unless the tenant has after the conveyance surrendered the lease to him and made new arrangements.⁵⁸ Under the modern statutes, the lessor by his assignment of the reversion parts with his right to enter for every breach of condition which may happen after the assignment. And the lessor who fails to exercise his rights to forfeit the lease while he is the owner of the reversion, cannot after he has parted with his reversion re-enter upon the premises either for a past or present forfeiture, unless he has been expressly given a right to do so, or unless he acts with the consent and by the authority of the new owner. Any other principle or rule of procedure would result in great unfairness to the grantee of the reversion and would be of no benefit to the grantor. The old principle that a forfeiture of a breach of a condition can only be exercised by the heirs of the person who created the condition has been gradually narrowed and certainly has no operation to the breach of the condition in a lease. If the lessor desires to take advantage of a forfeiture occurring before he sells the property he must do so before he parts with his title. To permit him to do this after the grantee has acquired the title would be useless, for, as against his grantee, he is estopped by his deed of conveyance and any title which he may acquire after he has given his deed would not enure to his benefit but simply to the benefit of his grantee. But the assignment by the lessor of his reversion in one of two pieces of property included in a lease will be confined in its operation to the one actually assigned and will not destroy the right of the lessor to enter upon the other piece for a breach of condition.⁵⁹ And finally and in conclusion, it should be said that the right to collect rents due at the date of the sale, or the right to recover for use and occupation prior to the sale, does not pass to the grantee in the absence of an express agreement to that effect. The debts created by this right belong to the lessor, are choses in action and hence are personal property.⁶⁰

⁵⁸ *Marney v. Byrd*, 11 Humph. (Tenn.) 95, 96.

⁵⁹ *Hyde v. Warden*, 47 L. J. Ex. 121, 3 Ex. D. 72, 37 L. T. 567, 26 W. R. 201.

⁶⁰ *Burden v. Thayer*, 3 Met. (Mass.) 76; *Bank of Pennsylvania*

v. Wise, 3 Watts (Pa.) 394; *Perkerson v. Snodgrass*, 85 Ala. 137, 4 So. Rep. 732; *Damren v. Power Co.*, 91 Me. 334, 40 Atl. Rep. 63; *Kennedy v. Kennedy*, 66 Ill. 190, 193; *Winckleberger v. Katzelburger*, 77 Mo. App. 117; *Pendill v.*

§ 320. The obligation of the grantee to tenants in possession.

A general grant of the reversion passes all the leases to which the property is subject, including the rents reserved; but the right of the grantee is subject to all the equities or just demands of the tenants or other incumbrance of which the grantee had notice.⁶¹ A grantee of the reversion which is subject to a lease made by the grantor is bound to take notice of all the rights of a tenant in possession.⁶² A grantee of the reversion who takes his conveyance subject to existing tenancies will be presumed as to such tenants to be bound to perform all covenants which run with the land. He will be presumed to have ascertained the nature, extent, and terms of the leases under which all tenants hold who are in possession when he receives the grant of the reversion in possession of the premises. This is a presumption of law. The fact that he has actual knowledge of the terms of the lease of any particular tenant will not rebut this presumption as to the other tenants. If,

Ells, 67 Mich. 657, 35 N. W. Rep. 754; *Van Driel v. Rosierz*, 26 Iowa, 575, 577. It results from these principles that a sale by a lessor of real estate during an unexpired leasehold term, under which a tenant is holding, does not of itself abrogate the lease, determine the leasehold estate or authorize the landlord or tenant to treat the lease as at an end. Its only effect is to substitute the vendee of the reversion to all the rights of the original lessor, and to transfer to such vendee the fealty and duty to pay rent under the lease not then matured, which, by the terms of the lease, the tenant had bound himself to pay to the original lessor. The vendee then becomes the landlord by operation of law, whose title the tenant, so long as he remains undisturbed in the possession, may not dispute; and the tenant becomes tenant of the vendee of the reversion, whose right to the pos-

session for the unexpired term the landlord may not gainsay so long as the tenant complies with the terms of the lease. By the court in *Otis v. McMillan*, 70 Ala. 46, on p. 54.

⁶¹ *Schoellkopf v. Coatsworth*, 66 N. Y. Supp. 979, 55 App. Div. 331, affirmed in 166 N. Y. 77, 59 N. E. Rep. 710. See, also, *Matter of Coatsworth*, 160 N. Y. 114, 54 N. E. Rep. 709, reversing 37 App. Div. 295, 55 N. Y. Supp. 753.

⁶² *Otis v. McMillan*, 70 Ala. 46; *Stone v. Snell* (Neb. 1906), 109 N. W. Rep. 750; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. Rep. 83, 9 L. R. A. 700; *McGlaufflin v. Holman*, 1 Wash. St. 239, 24 Pac. Rep. 239; *Schulte v. Schering*, 2 Wash. St. 127, 26 Pac. Rep. 78; *Bailie v. Rodway*, 27 Wis. 172; *Maul v. Rider*, 59 Pa. St. 167; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Rowe v. Ream*, 105 Pa. St. 543; *Howell v. Denton* (Tex. Civ. App.), 68 S. W. Rep. 1002.

therefore, the grantee collects rent from a tenant whom he finds in possession, he will be conclusively presumed to have affirmed a voidable lease which that tenant holds.⁶³ A grantee who takes land under lease has been held bound by an agreement between his grantor and the lessee that the latter should pay certain rents due by the grantor which payments were to be applied to the rent though the grantee was ignorant of such an agreement.⁶⁴ The mere possession or occupation of real property by a person without any other fact is not notice to an intending purchaser that the occupant is a lessee. The possession is notice that the occupant has some claim of title adverse to the grantor and it is incumbent on the purchaser to ascertain the present character and extent of the claim. He cannot safely assume he is a tenant because formerly he had been one for his status may have been changed by the agreement of the parties or by operation of law. The purchaser must inquire as to his present relationship to the property and a knowledge of a prior lease will not excuse the failure of the purchaser to inquire. The lessor may have made a surrender of the lease, or he may have entered into a contract with the owner to buy the property in which case he is a vendee in possession with an equitable right to enforce the specific performance of the contract. For, if a tenant during his tenancy change his character by agreeing to purchase the premises, his subsequent possession is notice of his equitable title as purchaser.⁶⁵ Or the prior lease may have been executed by fraud or duress and be voidable as to him, in which event, though the lease be for years, he may turn out to be merely a tenant at will. In all such cases, the purchaser must diligently inquire as to the existing rights of the person in possession for he may have some right of an equitable char-

⁶³ *Chesterman v. Gardner*, 2 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265; *Lazarus v. Hellman*, 11 Abb. N. C. (N. Y.) 93; *Anderson v. Brinser*, 129 Pa. St. 376, 404, 18 Atl. Rep. 520, 6 L. R. A. 205; *Rickert v. Snyder*, 9 Wend. (N. Y.) 415; *Beebe v. Coleman*, 8 Page (N. Y.) 392; *Scott v. Gallagher*, 14 S. & R. (Pa.) 333; *McMechan v. Griffing*, 3 Pick. (Mass.) 149; *Daniels v. Davison*, 16 Ves.

Jr. 249, 253; *Taylor v. Hibbert*, 2 Ves. Jr. 437; *Hanbury v. Litchfield*, 2 N. Y. & K. 629.

⁶⁴ *Hovey v. Walker*, 90 Mich. 527, 51 N. W. Rep. 678.

⁶⁵ *Daniels v. Davison*, 16 Ves. Jr. 249; *Allen v. Anthony*, 1 Mer. 287; *Anderson v. Brinser*, 129 Pa. St. 376, 404, 18 Atl. Rep. 250, 6 L. R. A. 205; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Rowe v. Ream*, 105 Pa. St. 543.

acter which it would be utterly impossible for him to put in record.⁶⁶ A lessee who takes a lease of premises, a part of which is leased to another, the second lease being made expressly subject to the rights of the prior lessee and who thereafter collects rents from the prior lessee, is estopped to deny the right of such prior lessee to a renewal under a cover and in his lease. The collection of the rent is an acceptance and affirmance of the prior lease and creates a presumption that the second lessee had informed himself of its terms and contents.⁶⁷

§ 321. **The notice to the tenant of the sale of the reversion.** It is always advisable that the grantee of the reversion should, as soon as possible, give the tenant notice of the fact that he has acquired title. This rule applies to the grantee who purchases at a judicial sale as well as to one who purchases under a contract with the owner. Where the tenant has no knowledge of the conveyance of the reversion and pays the grantor the rent which accrues subsequent to the conveyance acting in good faith, the grantee cannot recover the rent from him.⁶⁸ The grantee ought therefore, as soon as possible to put his deed on record and also notify all tenants who are in possession of the premises at the date of the conveyance to him, that he has acquired the title.⁶⁹ Whether the recording of the deed by the grantee alone is sufficient notice to the tenant of the sale has been variously determined. On the one hand, it has been held that the recording of the deed of conveyance covering the demised premises by the grantee is notice to the tenant in possession of the premises that the grantee named in the deed has acquired a right to collect subsequent rents. The courts have distinguished between a sale of the land and an assignment of the rent which is to become due, holding that while the former is a transfer of real estate and it is entitled to be recorded the latter is an assignment of a right of action of which actual notice must be given.⁷⁰ In the former case, the rents are a mere incident of the

⁶⁶ *Anderson v. Brinser*, 129 Pa. St. 376, 404, 18 Atl. Rep. 520, 6 L. R. A. 205.

⁶⁷ *Carre Hotel Co. v. Wells-Fargo Co.*, 128 Fed. Rep. 587, 590, 63 C. C. A. 23.

⁶⁸ *Sampson v. Grimes*, 7 Blackf. (Ind.) 173.

⁶⁹ *Farley v. Thompson*, 15 Mass. 18; *Fitchburg Cotton Mfg. Corp. v. Melven*, 15 Mass. 268; *Indiana Natural Gas & Oil Co. v. Lee*, 34 Ind. App. 119, 72 N. E. Rep. 492.

⁷⁰ *Gray v. Rogers*, 30 Mo. 258.

land which is assigned and a notice of the assignment or conveyance of the land having been given to the world by the recording of the deed, it will be presumed that the tenant knew of the transfer.⁷¹ But the weak point in this argument is that the record of the conveyance of the reversion is notice to such persons only as take a conveyance subsequent in point of time to the record. Of course, the record of the deed of the reversion is subsequent to the lease of the land under which the tenant enters so that this rule of notice should not apply to him. The safest method is to give actual notice that the demised premises have been sold by personally exhibiting the deed, or a certified copy to the tenant or tenants in possession. The grantee of the reversion should by some proper method notify all the tenants in possession of the premises of the fact that he has become the owner. He is bound to inquire and seek for the names of the tenants on the premises and the terms of their hiring. This he should do by actual inquiry on the premises and not by relying upon what the grantor tells him. If he neglects to use diligence in so doing and whether he is ignorant or not, and he delays to notify the tenant of the conveyance to him, he cannot collect rent which has accrued subsequently thereto.⁷² So, a grantee cannot recover rent from a tenant who has paid his rent in advance to his landlord before the date upon which it became due, though the grantee takes his conveyance before the date upon which it really accrues, and the tenant has no notice of the conveyance until after the time when the rent should have been paid according to the terms of the lease.⁷³ A grantee who neglects to inform himself of the relations existing between his grantor and a tenant as to the payment of rent cannot recover rent which has subsequently accrued but which has been paid in advance and before it became due by the tenant to the former landlord. But after the grantee has by proper methods notified the tenant in possession of the premises, that the title has passed to him, he has an absolute right as against such tenant to recover subsequently accruing rents. A tenant who, after a purchase of the reversion as shown him, his deed of convey-

⁷¹ *Peck v. Northrop*, 17 Conn. 217, 221.

⁷² *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. Rep. 193.

⁷³ *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. Rep. 193.

ance, pays subsequently accruing rents to the former owner, does so at the risk of having to pay them again to the new landlord. for the conduct of the tenant under such circumstances, whether it was the result of collusion with the former owner or not, is a fraud upon the purchaser of the reversion. When the purchaser subsequently sues him for rent accruing since the purchase, he cannot defend the action by alleging and proving that he had paid the subsequently accruing rents to a former landlord. The tenant in such a position is no better off than if he has paid no rent at all.⁷⁴ Under the statute of 4 Anne, c. 16, s. 10, which provides that no tenant shall be prejudiced by payment of rent to a grantor or by breach of any condition for non-payment before notice shall be given him by the grantee, a tenant who, having paid his rent in advance, receives notice from a mortgagee to pay the rent to him will be liable to the mortgagee for rent which accrues after the notice though the notice itself did not state that the party giving it was a mortgagee. On the receipt of such a notice, it is the duty of the tenant to seek information as to the character of the claimant. It is a general rule that the payment of rent before it is due is rather in the nature of a loan to the landlord than a payment of rent. When the rent becomes due it is converted into a payment of rent. If, in the meantime, rent having thus been paid in advance, the lessor conveys or mortgages the property, the payment in advance is not binding on the mortgagee unless he fails to give notice and where he gives notice he may collect the rent from the tenant which accrues after the date of the notice though it may have been paid in advance to the original lessor.⁷⁵

§ 322. **The effect of a sale of the reversion under a decree or judgment.** The sale of the estate of the lessor by the sheriff under an execution, or by virtue of a decree of a court of equity, does not put an end to a term created by a lease which was executed prior to the date upon which the judgment or decree became a lien upon the premises.⁷⁶ The purchaser at the execution sale or at the sale under the decree of the court, takes the

⁷⁴ *Sullivan v. Lueck*, 105 Mo. C. P. 132, 26 L. T. 97, 20 W. R. App. 199, 203, 79 S. W. Rep. 724. 367.

⁷⁵ *DeNicholls v. Saunders*, 22 L. T. 661, L. R. 5 C. P. 589; *Cook v. Guerra*, 41 L. J. C. P. 89, L. R. 7 ⁷⁶ *Smith v. Aude*, 46 Mo. App. 631, 634.

property sold subject to all leases which are prior to the lien of the judgment or mortgage, and subject to all the rights of tenants claiming under such leases. The extinguishment of the lessor's title by the sale under the decree or execution does not in any way effect the rights of tenants or render void the lease as between the tenant and the purchaser at the judicial sale. The sale operates merely as a transfer of the lessor's title under the lease to the purchaser. The purchaser may thereafter exhibit his deed to the tenant and he may demand of the tenant that the tenant attorn to him and pay him all rent subsequently accruing and if the tenant refuses to do this, the purchaser may oust him.⁷⁷ The foreclosure of the mortgage and the sale under foreclosure or a sale under an execution on a judgment where the lien of the mortgage or judgment is prior to the execution of the lease, puts an end to the term and exempts the tenant from all liability to the mortgagor or the execution creditor,⁷⁸ for rent accruing subsequent to the sale. But the purchaser at the sale under the foreclosure or under the execution may affirm a lease which is subsequent and subordinate to the mortgage or and require rents to be paid to him when he becomes the owner.⁷⁹

⁷⁷ *Smith v. Aude*, 46 Mo. App. 631, 634. *Oakes v. Aldridge*, 46 Mo. App. 11.

⁷⁸ *Burr v. Stenton*, 52 Barb. (N. Y.) 377, affirmed in 43 N. Y. 462; ⁷⁹ *Fitzgerald v. Beebe*, 7 Ark. 310.

CHAPTER XV.

THE NATURE AND INCIDENTS OF RENT.

- § 323. Rent. Definition and general characteristics.
- 324. Various kinds of rent distinguished.
- 325. Whether rent may be reserved out of personal property.
- 326. The payment of rent as evidence of tenancy.
- 327. The certainty of rent.
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§ 323. **Rent—Definition and general characteristics.** Rent may be concisely defined as a right to a compensation, certain or ascertainable, either in money, labor, provisions or other chattels, issuing and being paid out of lands and tenements due to their owner for their use.¹ In the first place, rent, considered

¹ *Stephens v. Reynolds*, 6 N. Y. 454; *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. Rep. 442, 444; *Parsell v. Stryker*, 41 N. Y. 480; *West Shore Mills Co. v. Edwards*, 24 Oreg. 475, 477, 33 Pac. Rep. 987. Other definitions are here given. A rent is a compensation paid for the use of land. It need not be in money. Any chattels or products of the soil serve the purpose equally as well. *Clarke v. Cobb*, 121 Cal. 595, 600, 54 Pac. Rep. 74; *Bloodworth v. Stevens*, 51 Miss. 475, 480. It is the compensation, either in money, provisions, chattels or labor, which is received by the owner of the soil, or the person entitled to the possession of the premises leased, for the use and occupation thereof, *Fisk v. Brayman*, 21 R. I. 195, 42 Atl. Rep. 878, 880. See, also, to same effect, *Rummel v. New York, L. E. & W. Ry. Co.*, 9 N. Y. Supp. 404, 407; *Tharn v. De Breteuil*, 83 N. Y. Supp. 849, 856, 86 App. Div. 405; *Gugel v. Isaacs*, 21 App. Div. 503, 506, 48 N. Y. Supp. 594. "Rent

is that which is to be paid for the use of land, whether in money, labor or other thing agreed upon. It is not due until the year is out when the renting is by the year, nor in arrears until after it is due. If not in arrears it passes with the sale of the reversion, without regard to the time of the year it was made, unless there has been some stipulation to the contrary." *Hudson v. Fuller* (Tenn.), 35 S. W. Rep. 575, 576. The definition of rent which can constitute a is "a certain profit issuing yearly out of lands and tenements corporeal." and includes every species or rent which can constitute a debt, without regard to the nature of the contract under which it is reserved. It is equally rent whether reserved on a lease under seal or by parol." *Chappell v. Brown*, 1 Bailey (S. Car.) 528, 529. "A rent is said to be a sum of money or other consideration issuing yearly out of lands or tenements. Blackstone defines 'rent' or 'redditus' as a compensation or

as a compensation for the use of land, is not the money, goods or service which the tenant renders to the landlord, but it is the right which is in the landlord to the same. In its original meaning, rent was something more than a mere right to sue for the value of the compensation when due. It was, and still is, to a certain extent, the right to distrain, i. e., take out of the income or profits of the property, compensation or return for its use.² The money or other articles of value which the rent is the right to receive, are sometimes incorrectly spoken of as being the rent itself. While the distinction is a rather minute one, yet it is important and should be borne in mind in order to secure a clear and reasonable understanding of what rent is. For the right to receive rent is ordinarily a chattel real while the things which constitute visible evidence of the enforcement of the right are always personal property. In the next place, rent is a right to receive a compensation which must be either certain in itself or which is capable of being made certain. This rule applies whether the rent is payable in money, services or in other things of value.³ And it must also be something which is rendered or delivered to the owner out of the profits of the land and not out of the land itself as it existed before the rent was created. Thus, the reservation in the lease of a portion of the crops, or of the timber which is growing on the land at the date of its execution, is not rent. An agreement by a tenant to deliver to the landlord a certain portion of the crops to be raised on the land by the tenant is rent. And in view of the fact that rent must be certain in its character an agreement by the tenant to deliver goods, render services or to pay money without the amount or value being fixed, is not an agreement to pay rent or a reservation of rent; nor can it be enforced against the

return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance; and it is defined to be a yearly profit issuing out of lands. It must be a profit, but it is not necessary that it should be in money; for spurs, capons, horses, corn, and other matters are frequently rendered for rent. This profit must be certain, or capable

of being reduced to a certainty." *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. Rep. 442, 445. See, also, *Peck v. Northrop*, 17 Conn. 217.

² *Van Rensselaar v. Read*, 26 N. Y. 558, 564; *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429, 580, 158 U. S. 601.

³ *Keneage v. Elliot*, 9 Watts (Pa.) 258; *Cornell v. Lamb*, 2 Cow. (N. Y.) 652.

tenant.⁴ Rents are distinguishable from annuities by the following characteristics: A rent is payable out of the income of land. That is to say, a rent when it is directed to be paid to a third party as a rent must necessarily be paid out of the income and profits of lands and tenements. Annuities like rents are certain in their amounts and are payable at fixed periods, but their payment is charged upon persons who are to make them and not upon any piece of property. It may be said, however, in this connection as will be subsequently explained at length, that the theory that rent was always payable out of lands and tenements has been rather extensively modified in modern times. The common law authorities adhere closely to the principle that rent is payable only out of the profits of real property because there could be no distress unless there was a rent. And the courts were not inclined to extend the remedy by distress to the hiring of chattels.⁵ And besides this there was the consideration that, inasmuch as rent and a distress always went together, the common law courts, recognizing their inability to enforce a distress in the case of the hiring of a chattel the use of which perhaps produced no visible or tangible results as would be the case where land was rented, refused to recognize "rent" as a proper word to use in connection with the hiring of personal chattels. And while in theory perhaps, most of the modern cases still insist that rent must issue out of the income of land, yet, in practice, rent is reserved for the use of all sorts of interests in both real and personal property, including articles of personal property such as furniture and other utensils of domestic use which are supplied to the tenants of furnished apartments.⁶ Calling the compensation for

⁴ *Walsh v. Lonsdale*, L. R. 21 Ch. Div. 9; *Smith v. Fyler*, 2 Hill (N. Y.) 648; *Commonwealth v. Contner*, 18 Pa. St. 439, 447; *Ocean Grove Camp Meeting Ass'n v. Sanders*, 67 N. J. L. 1, 50 Atl. Rep. 449; *Cross v. Tome*, 14 Md. 247; *McFarlane v. Williams*, 107 Ill. 33; *Dutcher v. Culver*, 24 Minn. 584; *Co. Litt.* 96a.

⁵ *Co. Litt.* 213; 2 Black. Comm. p. 42; 3 Kent's Comm. p. 460.

⁶ *Eastman v. Anderson*, 119 Mass. 226; *Mickle v. Miles*, 31 Pa. St. 20; *Vetter's Appeal*, 99 Pa. St. 52; *Newman v. Anderson*, 5 Bos. & P. 224, 5 Co. 116b; *Gilberts' Rents*, 187. "By the ancient writers it is said every rent must be reserved out of lands and tenements which are manurable and upon which the lessor may distrain. It may be reserved out of a remainder or reversion or a conveyance

the enjoyment of the demised premises by any other name than rent does not deprive it of its character as such. Thus, where the compensation is styled an assessment in the lease of camp meeting grounds and its precise amount is not to exceed a stated maximum to be fixed annually by the lessor, it is still rent within the statute.⁷

§ 324. **Various kinds of rent distinguished.** By the common law authorities rents were divided into three classes, i. e., rent service, rent charge, and rent seek.⁸ A rent service is a rent reserved upon the granting of land where the reversion continues in the grantor. It was so called because it always involved an obligation on the part of the tenant to give some corporeal services to the landlord; as where the tenant held the land by fealty, and the payment of five shillings; or where he held by the service of ploughing the lord's land and paid five shillings rent. Its other characteristics are that it always arises by the express reservation of rent; that it continues the reversion in the landlord and that arrears of rent may be recovered at common law by distress.⁹ This was the most common form of rent in very early times. The landlord could, however, only distrain for the rent while he owned the reversion and the right to the rent with the incidental right to distrain passed with the reversion.¹⁰ A rent charge is the right to collect a certain rent at specified periods out of the profits of land granted, and was usually secured by a distress which was expressly created by the instrument creating the rent charge. In creating a rent charge the owner either parts with his whole interest in the fee reserving to himself the payment of a rent charge either in money or some other valuable thing; or it is created by the owner of the land granting a right to collect the rent charge out of the issues and profits

to uses where the use is executed by the statute. It cannot be reserved out of an incorporeal hereditament, as out of a right of common, advowson, franchise title or curtesy. If land and an incorporeal thing be demised together, rendering rent, it shall issue wholly out of the land in point of remedy of distress." Co. Litt. 47a, 142a; Com. Dig. Rent (B, 3).

⁷ Ocean Grove Camp Meeting Ass'n v. Sanders, 67 N. J. Law, 1, 50 Atl. Rep. 449.

⁸ Co. Litt. 213; Bacon's Abb. tit. Rent; 3 Kent's Com. 460; 2 Bl. Com. 42.

⁹ 2 Bl. Com 42; 3 Kent's Com. 461.

¹⁰ Co. Litt. 142a, 148a.

of the land to some third person. In both these cases the land must be expressly charged with a right to collect rent by a distress for in the absence of such an express charge the right to a distress does not exist in a rent charge. This species of rent, which is called a rent charge because the land is charged with the payment of the rent and with the right to collect it by distress is created solely by the operation of the deed creating it and not by the operation of law. A rent seek or barren rent is a rent or a right to collect a certain profit at specified periods out of the income of land, but without any right of distraining for such rent either at common law, or by any express stipulation in the lease. It could be created by deed where the right to a distress was omitted or it could be created in the same way as the rent service.¹¹ A fee farm rent is a rent charge reserved in a grant of land in fee. This name is based on the perpetuity of the rent or services and not upon its amount.¹² This form of rent was at one time common in some of the eastern states and is still recognized in Maryland and Pennsylvania, where large quantities of land are held by tenants on perpetual leases. Rents of assize were in England the established rents of ancient tenants paid in a fixed amount of money or a certain quantity of the products of the land. They were called rents assize because they had been assized, that is, ascertained or made certain to distinguish them from variable rents that rose and fell according to the circumstances.¹³ A quit rent was a rent reserved, payable yearly either in money or in services and by which the tenant was quit of all other service to the landlord. What was technically known as old rent was such yearly rent as had always been paid. Improved rent

¹¹ *People v. Haskins*, 7 Wend. (N. Y.) 43; *Cuthbert v. Kuhn*, 3 Whart. (Pa.) 357; Co. Litt. 218.

¹² *The Governors of Christ's Hospital v. Hattold*, 2 M. & G. 712; Co. Litt. 143b; *Van Rensselaer v. Chadwick*, 23 N. Y. 32. In Pennsylvania, however, a ground rent is said to be a rent service and not a rent charge. Hence if a release of a part of the land from the rent is made, the rent is ap-

portioned. *Ingersoll v. Sargeant*, 1 Whart. (Pa.) 337.

¹³ The difference between rents-seek and rents assized, fee farm rent, etc., was abolished in England by the statute IV, 4 Geo. 2, c. 28, and by that statute a right of distress was given in the case of rent-seek and rent assized as well as in the case of rents expressly reserved.

is the rent advanced on the old rent. A fine or premium paid by the lessee to the lessor at the time of taking or renewing a lease, is in the nature of an advanced payment of rent, and is considered as an improved rent. Rack rent is a payment of rent which is presumed to be of the full value of the premises or nearly so.¹⁴ A net rent is a sum to be paid to the landlord clear of all deductions.¹⁵

¹⁴ Co. Litt. 295.

¹⁵ *Bennett v. Womack*, 7 B. & C. 627, 1 M. & Ry. 644, 3 Car. & P. 96, 6 L. J. (O. S.) K. B. 175, 31 R. R. 270, holding that under an agreement for a "net rent" the tenant must pay taxes and rates. Rent service is the most ancient species of rent known to the common law. It had its origin when in England the villeins or serfs who had cultivated the land of the lords of manors began to be emancipated. The land which they had cultivated up to that time as serfs of the lords was parceled out to them and to their families, for their support; and, as might be expected, they were required to render a portion at least of the same or similar service which they had rendered prior to their emancipation. In some cases the emancipated serf was bound in return for the use of the land for his support to deliver to his lord a certain quantity of the crops raised upon it, while in other cases he was required to perform certain stipulated services for him. The ownership of the land remained where it had been before the creation of this new relation, and the newly created tenant acquired only a portion of the owner's interest, which might be for a term of years, for the life of the tenant, or for the life of some other per-

son, but always upon the express condition that he should render some equivalent to the lord for its use and for the support which he derived from it for himself and family. The right of the landlord to the receipt of this service or provision was known as rent service, and this species of rent was for centuries almost the only kind existing in England. It was the most widely recognized form of paying rent in England, and at one time even was prevalent and well recognized in the eastern section of the United States of America. With the substitution of the payment of money in place of the actual products of the land, the form of rent service has continued down to the present time. With one exception, however, most of the feudal incidents of rent service, such as distress and attornment, have been abolished by statute in the United States. That exception is the estoppel of the tenant to deny the title of his landlord, which was unquestionably based upon the fealty of the ancient tenant to the lord of whom he held his land; and to whom he was bound to render certain specified services, the most important of which in many cases would be to aid that lord in defending by force the title of the land of which, with others, he was a tenant.

§ 325. Whether rent may be reserved out of personal property. According to the definition above given, it seems absolutely necessary that a rent shall issue out of land or some corporeal thing, or in other words that it shall come from some inheritance whereunto the owner or grantee of the rent may have recourse to distress. Some of the authorities have held that a rent may be reserved out of personal chattels while others have denied this proposition, basing their denial upon the rule that chattels are of such a nature that no distress can be had for a default in the payment of the rent for them.¹⁶ Thus, it was said that a rent cannot issue out of a right of common, for as a common was really granted for the benefit of every one of the tenants, and as the right of common which every tenant thus has runs through the whole common, and no particular tenant has a right to one part more than another, it follows that no distress can be taken therefor. The same rule was applied to a warren or right of hunting,¹⁷ and also to a piscary or right of fishing,¹⁸ and in England a reservation of rent upon a lease of tithes was not good for the reason that there was no place upon which the distress could be taken.¹⁹ A great deal of unnecessary and obsolete learning may be found in the books of the ancient writers on these questions. Most of it has no application to the present time or to the condition of things in the United States by reason of the fact that in nearly every state of the union, the right of distress for rent has been abolished so that calling a payment rent, whether for the use of a chattel or for the use of land, does not entitle the payee to distrain. Hence, if a chattel interest be leased the payment is still rent in the modern acceptance of the term though no distress can be levied, and there can be no question that at the present day a reservation of rent for a lease of a fishing privilege in a stream, or for a lease of a hunting privilege on land, or for the use of the water of a stream, or for the use of pasture for cattle on land would be rent, though the lease is a mere license to enter on the land and not to use the land itself. But, in England down to comparatively recent times

¹⁶ Bacon's Abr. tit. Rent (A)

¹⁸ Co. Litt. 144.

P. 8; 6 Bacon's Abr. tit. Rent (B) 8.

¹⁹ Jewel's Case, 5 Co. 3; Cro. Jac. 111, 173.

¹⁷ Noy, 60; 3 Leon, 1.

where land and personal chattels such as a ship or farm implements and a house and its furniture were leased, the theory continued to be that the rent agreed to be paid issued only out of the house and the land, and the lessor was confined, in bringing an action on the covenant to pay rent, to state that it was simply and solely a demise of the land.²⁰ If the lessee is evicted from the land but retains the chattels there was anciently no apportionment of the rent.²¹ But it has also been held that where a landlord's assignees in bankruptcy leased a furnished house to a prior tenant at an entire rent and subsequently the mortgagee of the house compelled the tenant to pay rent to him the rent for the furnished house should be apportioned and the assignee in bankruptcy could recover for the rent for the use of the furniture.²²

²⁰ *Salmon v. Matthews*, 8 M. & W. 827; *Collins v. Harding*, Cro. Eliz. 607; *Spencer's Case*, 5 Rep. 16; *Walsh v. Pemberton*, Selw. N. P. 613. Inasmuch as rent issues out of real and not out of personal property, proof of a lease of real property is not a variance under an allegation of a lease of a house and the furniture and utensils in it. *Farewell v. Dickenson*, 6 B. & C. 251. "It must occur constantly that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods, for rent cannot issue out of goods." By the court in *Newman v. Anderton*, 2 W. R. 224.

²¹ *Emott v. Cole*, Cro. Eliz. 255.

²² *Salmon v. Matthews*, 8 M. & W. 827, 11 L. J. Ex. 59. For a case where personal chattels were leased for a term of seventeen years, see *Jones v. Wingfield*, 3 M. & S. 846, 10 Bing. 308. By statute as well as by usage in this commonwealth, the word "rent" may include the compensation to be paid for the occupation of land by

a tenant, whether he holds under a written lease, at will, or at sufferance, and whether the amount to be paid has been defined by the agreement of the parties, or has been left indefinite. *Kites v. Church*, 142 Mass. 589. In *Commonwealth v. Contner*, 18 Pa. St. 447, the court, by Black, C. J., said: "Now a sum of money payable periodically for the use of chattels is not rent in any legal sense of the word. It cannot be distrained for; and unless it can, it is not demandable out of the proceeds of a sheriff's sale. For this right comes in place of a distress by the plain words of the statute. Rent must not only issue out of the land, but it must be fixed, definite, and certain in amount, whether payable in money, chattels or labor. If, therefore, a lease so mixes the real and personal property together that it cannot be determined how much of what is called the rent is to be paid for the chattels, and how much is the profit of the land, there can be no distress for non-payment of it. Rent signifies a re-

§ 326. The payment of rent as evidence of tenancy. The receipt and payment of rent are only *prima facie* proof of the existence of a tenancy. A presumption that a tenancy exists may be overcome by showing that the money was paid for some other consideration than as rent under an existing lease,²³ as for example that it was paid for rent due under a former lease,²⁴ or that it was paid by the tenant under an order of the court or in order to prevent a distress.²⁵ So the fact may be shown to rebut an existence of a tenancy, that the sum actually paid was only a small portion of the actual rental value of the premises. Whether the money was actually paid for rent or not, where the evidence is disputed is for the jury to determine.²⁶ The fact that the money was paid as rent does not establish any particular term or holding, and if the beginning of the tenancy or its length is in question these facts must be shown by other evidence.²⁷ Where money is paid for rent and a receipt is given for it dated on a particular day, the receipt is *prima facie* evidence of the beginning of a tenancy upon that day, or upon some previous day. So if rent is payable by the lease quarterly, semi-

turn or compensation, and a certain profit issuing yearly out of lands and tenements corporeal. It must be a profit, though it need not be in money. It must be certain, or that which may be reduced to a certainty by either party. It must issue yearly, though it need not issue every successive year, but may be reserved every second, third or fourth year, etc. It must issue out of the thing granted (it must issue out of lands and tenements corporeal); therefore, a rent cannot be reserved out of an advowson, or the like. But a grant of such a sum may operate as a personal contract, and oblige the grantor to pay the money, or subject him to an action of debt. Co. Litt. 47."

²³ Phillips v. Mosely, 1 Car. & P. 262; Den v. Rawlins, 10 East, 261; Right v. Bawden, 3 id. 460; Doe d.

Lord v. Crago, 6 C. B. 90, 17 L. J. C. P. 263, 12 Jur. 705; Hurley v. Hanrahan, 15 W. R. 990; Attorney General v. Stephens, 6 De G., M. & G. 111, 25 L. J. Ch. 888, 2 Jur. (N. S.) 61, 4 W. R. 191; Cox v. Knight, 18 C. B. 645, 25 L. J. C. P. 314; Harden v. Hesketh, 28 L. J. Ex. 137, 4 H. & M. 175, 7 W. R. 186.

²⁴ Den v. Rawlins, 10 East, 261; Right v. Bawden, 3 id. 460.

²⁵ Strahan v. Smith, 4 Bing. 96, 12 Moore, 289, 5 L. J. (O. S.) C. P. 95.

²⁶ Doe v. Wilkinson, 3 Bar. & Cres. 413.

²⁷ Phillips v. Mosely, 1 Car. & P. 262, in which case it was said that the mere fact that the money was paid as rent would be as good evidence of a lease for twenty-one years as it would be of a lease from year to year.

annually or otherwise, at certain stated or uniform dates the presumption from the payment of rent on those dates is that the holding is to be in accordance with the lease.²⁸ The payment of the rent also raises a presumption against the tenant that the person receiving it has a good title to the rent which is conclusive where the rent is paid to the person from whom possession was taken as the tenant is not permitted to dispute the landlord's title. If the rent is claimed by a person other than the one from whom possession was taken, his title to the rent may be disputed.²⁹

§ 327. **The certainty of rent.** The rent of the land in whatever way it is paid by the tenant must be certain in its amount, or capable of being reduced to certainty by computation. If the rent is susceptible of being reduced to a certainty by computation, it is sufficiently certain. Thus, where rent was to consist of the delivery of one bale of cotton for each acre cultivated by the tenant, it was held that though the value of the cotton was not fixed, yet the rent was sufficiently certain as the value of the bale of cotton could be readily ascertained.³⁰ The fact that the amount of rent is not definitely stated in the lease, and that it has to be computed in order to ascertain how much is payable, does not prevent its collection. The rule applies in this case as in others that those things are certain which may be made so. Thus, rent may be made to vary according to the value of the land. An agreement to pay rent on the lands comprised in a farm at a certain percentage on their value includes all the land comprised in the farm whether cultivatable or not, but not land in the farm occupied by a railroad for a roadbed and right of way.³¹ So where rent is raised in proportion to the increased income from the premises which the tenant uses for the purpose of supplying steam power to other houses in the same block, the rent is varied according to the amount to which the income is increased. In such a case gross income and not net income is meant.³² A mathematical error in calculating or a clerical

²⁸ *Sandhill v. Franklin*, L. R. 10 C. B. 342.

²⁹ *Rodgers v. Pitcher*, 6 Taunt. 208; *Cornish v. Searell*, 8 B. & C. 471; *Cox v. Knight*, 18 C. B. 645.

³⁰ *Brooks v. Cunningham*, 49 Miss. 108.

³¹ *Williams v. Glover*, 66 Ala. 189, 193.

³² *Hardy v. Briggs*, 14 Allen (Mass.) 473.

error in stating in the lease the amount of the quarterly installment of rent may be disregarded. The covenant to pay a fixed sum as yearly rent controls the statement of the installments and where the total amount of the quarterly payments falls short of, or exceeds the yearly rent, the court will assume that the latter is the correct amount.³³ An agreement to pay a certain named sum for rent, subject to any error in the figuring thereto attached is not void for vagueness and indefiniteness. The sum named is certain and will control unless a mistake in the figuring is shown. This may always be done by parol evidence where the rental amount is the result of an arithmetical calculation though it is not stipulated for in the lease. The lease is not void for uncertainty if it give sufficient data by which the amount of rent due can be found though it has to be worked out by calculation. It may also be sufficient to state a gross sum as rent assumed to be the result of such a calculation which will be presumed to be correct until the contrary is proved.³⁴

§ 328. **Rent to become due on the happening of some future event.** It is always competent for the parties to a lease to stipulate therein that money rent shall become due and payable upon the happening of some particular event in the future. A contingent event may be selected by the parties, and if such an event does not happen, the rent does not become due. Thus, rent may be made to become due and payable when certain buildings are erected on the premises, and are complete whether they are to be erected by the landlord or by the tenant, or when the crops mature, and are ready to be gathered, or when the tenant's income and profits from his use of the premises shall amount to a certain sum. In all these cases the happening of the contingency upon which the rent is to become due and payable, is a condition precedent to any liability for rent on the part of the tenant. Thus, no rent is due by the tenant under an agreement by the landlord to erect additional buildings, the tenant to pay as rent a certain percentage of the cost of such buildings until the buildings are complete, and the landlord has notified the tenant of the cost of the buildings.³⁵ A lease which provides that

³³ *Smith v. Blake*, 88 Me. 241, 247, 33 Atl. Rep. 992.

³⁵ *Weed v. Crocker*, 13 Gray (Mass.) 219, 221.

³⁴ *McFarlane v. Williams*, 103 Ill. 33, 43.

the payment of the rent shall not begin until the landlord has completed a certain building on the premises, is not void for want of mutuality because it does not expressly provide that the landlord shall complete the building. The time for the completion of the building, not being of the essence of the lease may be fixed by a subsequent agreement,³⁶ and the fact that the landlord has not expressly agreed to complete the building, is immaterial as under such a lease, the completion of the building by him would be regarded as a condition precedent to the payment of rent. In case a sum specified as rent is to be due and payable on the non-happening of a particular event, the burden of proving that the event has not happened is upon the landlord claiming the payment of the rent. This view is in accordance with the well settled rule that where proof of the negative is essential to the existence of a right the party claiming the right has the burden of proving the negative.³⁷

§ 329. **Rent payable in services.** Rent may be made payable by the lease, in services to be rendered to the landlord by the tenant as well as in money or in merchandise. Thus, an agreement with the owner by the occupant of land to live on it, and to keep off trespassers, to fence the land, construct irrigation ditches, to plant trees or to erect buildings with material furnished by the owner,³⁸ is an agreement to pay rent and constitutes the occupant a tenant of the owner.³⁹ So also rent may be paid in the furnishing of maintenance and support by the tenant for the landlord, and in all these cases where rent is payable in services the same rules apply as where rent is payable in money, for if there be a default in the rendition of such services, the landlord may pursue the same remedy for the recovery of possession as though the rent was payable in money only.⁴⁰ So also services rendered in cleaning a church,⁴¹ or in shearing

³⁶ *Hammond v. Barton*, 93 Wis. 183, 67 N. W. Rep. 412.

³⁷ *City of New Albany v. Enders*, 143 Ind. 192, 42 N. E. Rep. 683; *Mississinewa M. Co. v. Andrews*, 22 Ind. App. 523, 54 N. E. Rep. 146.

³⁸ *Shaw v. Hall*, 79 Mich. 86, 44 N. W. Rep. 422.

³⁹ For other cases where rent is payable wholly or in part in services rendered, see § 326.

⁴⁰ *Gilpin v. Adams*, 14 Colo. 512, 24 Pac. Rep. 566.

⁴¹ *Burns v. Cooper*, 31 Pa. St. 426; *Edney v. Benham*, 7 Q. B. 796.

sheep,⁴² or in carrying coals for the landlord,⁴³ reserved in the lease as compensation for the use of the premises, have been held to be a sufficient reservation of rent. Where land is leased by an aged person upon the consideration that the lessee will support the lessor and his wife the court may imply that the furnishing of maintenance and support by the lessee, is a condition upon which a possession must be based. If the main purpose of the use and possession of the land were the support of the lessor, a condition may be read into the lease, though there is no express agreement that the lessee should forfeit his possession in case he failed to support the lessor. But the fact that there is a clause of re-entry and forfeiture upon the failure of the lessee to fulfill his agreement, is conclusive that the lease was made upon condition, and that the agreement for support was not merely a covenant.⁴⁴

§ 330. **Rent payable in specific articles.** Rent may be made payable by the delivery of specific articles by the tenant to the landlord.⁴⁵ Thus, a store-keeper, or manufacturer who occupies a store, warehouse or factory as a tenant, may by special agreement be obliged to pay his rent in particular articles of merchandise dealt in or manufactured by him. So, also it may be arranged that these articles shall be selected by the landlord, the lease specifying the limit of value to which the gross amount selected must be confined. But the most common instance of rent being paid in specific articles of merchandise occurs where the owner of farm land, and a tenant occupying such land for the purpose of cultivating it, agree that the rent for the land shall be paid by the tenant delivering to the landlord a certain proportionate share of all the crops produced by him on the land during the term. Where rent is payable in specific articles, the price of which is fixed by the lease, the rent is extinguished by the tender of the articles on the day fixed for payment whether the price or value of the articles is more or less upon the day when they are tendered than on the day when the lease was made.⁴⁶ All that the landlord can recover in money upon the failure of the tenant to deliver the articles in payment

⁴² Co. Litt. 96.

⁴⁵ *Pace v. Goodson* (Ga. 1906),

⁴³ *Doe v. Morse*, 1 B. & Ad. 365. ⁵⁶ S. E. Rep. 363.

⁴⁴ *Ganson v. Baldwin*, 93 Mich.

of the rent, is the value mentioned in the lease, though the value of the property upon the day when they should have been delivered was greater than that mentioned in the lease.⁴⁷ If, however, rent is to be paid in chattels, the value of which is not specified in the lease the landlord may upon the failure of the tenant to deliver the chattels, recover in money their market value as it existed on the day fixed for the payment.⁴⁸ Rent which is payable in crops is due and payable within a reasonable time after the crops have matured.⁴⁹ It is due when the crops or any portion of them are fit for the market though they may not have been harvested by the lessee. Rent payable in crops must be paid when oats are in stack, corn is reaped and the tenant has gathered in and is feeding the corn. It need not be that the crops are actually ready for market for if this were so the tenant might delay the payment of rent indefinitely by failing to harvest and prepare the crops for sale.⁵⁰ Where rent is payable in specific articles raised or manufactured on the land a division and a delivery of the landlord's share is necessary to vest the title to the personal chattels in the landlord, as against creditors of the tenant.⁵¹ Any act intended to and which does enable the lessor to acquire possession of or dominion over the thing to be paid is a sufficient delivery to divest the tenant's title.⁵² Where rent is payable in chattels or services absolutely, the tenant has no right without the landlord's consent to an option to pay the rent in money. Thus, where rent was payable half in money and half in board, it was not optional with the tenant to pay all the rent in money or board as was most convenient for him, but he was compelled to pay his rent half in board just as far and to the same extent as the landlord was obliged to receive half the rent in board.⁵³ A right in the lessor

⁴⁶ Heywood v. Heywood, 42 Mo. 299.

⁴⁷ Heywood v. Heywood, 42 Mo. 299.

⁴⁸ Heywood v. Heywood, 42 Mo. 299; Brooks v. Cunningham, 49 Miss. 108.

⁴⁹ Toler v. Seabrook, 39 Ga. 14.

⁵⁰ Hull v. Stogdele, 67 Iowa, 251, 253, 25 N. W. Rep. 156.

⁵¹ Davis v. Hamilton, 71 Ind.

135, 136; Burns v. Cooper, 31 Pa. St. 426, 427; In re Wait, 7 Pick. (Mass.) 100, 105, 19 Am. Dec. 262.

⁵² Burns v. Cooper, 31 Pa. St. 426, 427.

⁵³ Evans v. Morris, 6 Mich. 369, which also held that the tenant was not bound by this lease to call on the landlord and demand that he should send him boarders, but that the landlord must call for

to elect whether he shall take the rent in specific articles or in money terminates with the death of the lessee. The lessor has no title to or interest in the personal property until he elects to take it and it is delivered to him. The interest not being a present one the power to elect is not a power coupled with an interest. Until the lessor elects the personal property is subject to the claims of the creditors of the lessee and, on his death, the personal property is assets in the hands of the tenant's personal representative. Its character thereafter is fixed and the lessor can no longer claim it *in specie* for the payment of the rent.⁵⁴ An agreement for the commutation of rent which is payable in specific articles is not to be conclusively presumed from a continued course of dealing which consists of paying and receiving a stated sum of money in lieu of rent. Though it appears that the amount of money paid as rent was about equal to the value of the articles to be delivered as rent there is no presumption that the parties intended the payment and receipt of the money to be a commutation of the payment of the rent in specific articles. It may be assumed with equal reason that neither of the parties meant to waive the right to insist upon the future payment of rent on the terms of the lease but that the payment in money instead of in personal property was merely to suit the temporary convenience of the parties. But after such a course of dealing carried on for many years, the lessor will not be permitted to insist upon the original terms of the lease as to the mode of payment and declare a forfeiture upon the failure of the lessee to comply with such terms on short notice where the articles in which the rent was to be paid were difficult for the lessee to procure because of the fact that they had to be imported. The lessee must be given ample time under the circumstances to procure the articles with which he is bound to pay the rent.⁵⁵ An agreement by a lessee to pay to the lessor a specified share of the profits made upon the premises is an agreement to pay rent. The lessee is bound to do his outmost to make a profit on the use of the land and, in the absence of proof to the contrary, in an action between him and his lessor it will be presumed that

that portion of the rent payable in board within the year as the rent fell due.

⁵⁴ *In re Wait*, 7 Pick. (Mass.) 100, 105, 19 Am. Dec. 262.

⁵⁵ *Lilley v. Associates*, 101 Mass. 432, 435.

he has done so.⁵⁶ Where under a lease of this character the landlord sues for his share of the profits the burden of proof is on the lessor to show what the profits are. If through the negligence of the lessee, or through his failure to cultivate the land there are no profits he is liable to pay the lessor what the use of the land would be reasonably worth.

§ 331. **The express covenant to pay rent.** Inasmuch as the liability of a tenant to pay rent which is raised by implication in the absence of an express covenant, ceases to exist as soon as the tenant assigns his lease and surrenders the possession, which he may do to a beggar or insolvent person without his landlord's consent,⁵⁷ it is very desirable for the protection of the landlord that the tenant should expressly covenant to pay rent. The tenant who does covenant is bound by the covenant until the end of his term, unless he is sooner released by the landlord, irrespective of the fact that he decides not to enter into possession,⁵⁸ or the fact that after an entry he assigns his lease and surrenders the premises. In the latter case, as the covenant to pay rent runs with the land, the landlord has a double security, for he may first proceed against the assignee by reason of the privity of estate existing with him, or against the original tenant and assignor upon the latter's covenant to pay rent. For the covenant to pay rent is a covenant running with the land and is bidding on the assignee of either party though not expressly so stated.⁵⁹

§ 332. **A covenant to pay rent may be implied.** Beside the reservation of rent in the lease, an express covenant by the lessee to pay rent is usually inserted. In all cases where the latter is absent from the lease a covenant on the part of the lessee to pay rent will be implied. He will be presumed to have bound himself by the act of taking possession and continuing

⁵⁶ *Spring Brook Ry. Co. v. Lehigh Coal & Navigation Co.*, 181 Pa. St. 294, 37 Atl. Rep. 525.

⁵⁷ *Taylor v. Shum*, 1 Bos. & Pul. 21; *Onslow v. Carrie*, 2 Madd. 330.

⁵⁸ *Tully v. Dunn*, 42 Ala. 262; *McGlynn v. Brock*, 111 Mass. 219.

⁵⁹ *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. Rep. 104; *Carley v. Lewis*, 24 Ind. 23; *Trask v. Graham*, 47 Minn. 571, 50 N. W. Rep.

917; *Main v. Feathers*, 21 Barb. (N. Y.) 646; *Dolph v. White*, 12 N. Y. 296; *Sandwith v. De Silver*, 1 Browne (Pa.) 221; *Bradford Oil Co. v. Blair*, 113 Pa. St. 83, 4 Atl. Rep. 218, 57 Am. Dec. 442; *Fennell v. Guffey*, 139 Pa. St. 341, 20 Atl. Rep. 1048; *Shaw v. Partridge*, 17 Vt. 626; *Croade v. Ingraham*, 13 Pick. (Mass.) 33, 35

therein to pay the landlord what the use and possession of the premises are reasonably worth. A covenant to pay rent will be implied on the part of a lessee by his receiving and accepting a lease by deed poll reserving rent,⁶⁰ without any covenant to pay rent even though the lessee does not go into possession.⁶¹ The acceptance by the lessee of an instrument which gives him an absolute right to an immediate possession creates the implied promise to pay rent for what he has a right to enjoy. This promise is not within the Statute of Frauds.⁶² In all these cases of an implied promise to pay rent the landlord may maintain an action of assumpsit against the tenant for the rent. Unless therefore the landlord in suing relies upon an express agreement by the tenant to pay rent, it is not necessary for him to prove one, nor is it necessary for him to prove even a particular reservation of rent, in the lease, or that the occupant has ever paid him rent. All that the landlord must prove is that the occupant was in possession with his permission or, in other words, that the relation of landlord and tenant existed between him and the occupant. If this fact appears the law will permit the landlord to recover for the use and occupation under the fiction that the occupant has promised to pay the owner what such use and occupation were reasonably worth.⁶³ But a promise by an occupant of land to pay rent is not inferred from oc-

⁶⁰ Pike v. Brown, 7 Cush. (Mass.) 133.

⁶¹ Kabley v. Worcester Gas Light Co., 102 Mass. 392.

⁶² Providence Christian Union v. Eliot, 13 R. I. 74, 75; Goodwin v. Gilbert, 9 Mass. 510; Sage v. Wilcox, 6 Conn. 81; Allen v. Pryor, 3 A. K. Marsh. (Ky) 305. An agreement to take premises "at and under at rent specified" is an agreement to pay rent for which assumpsit will lie. Doe d. Rains v. Keller, 4 Car. & P. 3.

⁶³ Jackson v. Mowry, 30 Ga. 143; Littleton v. Wynn, 31 Ga. 583; Crouch v. Birles, 7 J. J. Marsh. (Ky.) 255, 23 Am. Dec. 404; Oakes v. Oakes, 16 Ill. 106; Fanning v. Stimpson, 13 Iowa, 42; Appleton

v. O'Donnell, 173 Mass. 398, 53 N. E. Rep. 882; Knox v. Bailey, 4 Mo. App. 581; Wilkinson v. Wilkinson, 62 Mo. App. 249, 1 Mo. App. Rep. 523; Sweesey v. Durnall, 23 Neb. 531, 37 N. W. Rep. 459; Welcome v. Labonte, 63 N. H. 124; Chambers v. Ross, 25 N. J. Law, 293; Seaman v. Ward, 1 Hilt (N. Y.) 2; Scranton v. Booth, 29 Barb. (N. Y.) 171; Coit v. Planer, 30 N. Y. Super. Ct. 413, 4 Abb. Prac. (N. Y.) Rep. 140; Lynch v. Onondaga Salt Co., 64 Barb. (N. Y.) 558; Heidelbach v. Slader, 1 Handy (Ohio) 456; Sterrett v. Wright, 27 Pa. St. 259; Cobb v. Kidd, 8 Fed. Rep. 695, 696; Carpenter v. United States, 17 Wall. (U. S.) 489, 493.

cupation alone.⁶⁴ It must also appear that the person in possession was occupying as a tenant and not in some other capacity. For if he is a licensee,⁶⁵ or a trespasser, or a vendee in possession under his contract to purchase,⁶⁶ or a public official holding possession after his term has expired,⁶⁷ or a caretaker,⁶⁸ or if, in express terms, he repudiates the relation of tenant to the owner there is no implied liability to pay rent. It is often important to distinguish where a lease is assigned by a lessee between a lease where the covenant to pay rent is an express covenant, and a lease in which a covenant to pay rent is only implied. If the covenant is express a privity of contract arises between the lessor and the lessee which endures during the term in the absence of a surrender no matter who may be in possession of the premises themselves. If, however, the covenant to payment is implied the tenant is liable only by reason of his privity of estate with the landlord which liability ends on his assignment of the term to another and the entry of the assignee upon the premises, with the acceptance of rent from him by the lessor.⁶⁹ The words "yielding and paying" rent contained in most leases have from the earliest times furnished an opportunity for much discussion as to whether they did or did not constitute an express covenant to pay rent. There can be no question that a lessee going into possession under a lease which contains these words will be liable on an implied promise to pay the rent to the lessor for, if he enjoys the possession of the premises, he will be conclusively presumed to have promised to pay for it.⁷⁰ But the question is very different when after an assignment of the ori-

⁶⁴ *Bank v. Getchett*, 59 N. H. 281, 285; *Welcome v. Labontee*, 63 N. H. 124, 125; *Middleton's Ex'rs v. Middleton*, 35 N. J. Eq. 141; *Mitchell v. Pendleton*, 21 Ohio St. 664, 666.

⁶⁵ *Strickland v. Hudson*, 55 Miss. 235.

⁶⁶ *Miles v. Elkins*, 10 Ind. 329; *Lapham v. Norton*, 71 Me. 83; *Little v. Pearson*, 17 Pick. (Mass.) 201, 19 Am. Dec. 289. *Contra*, *Gould v. Thompson*, 4 Metc. (Mass.) 224.

⁶⁷ *Cass County Sup'rs v. Cow-*

gill, 97 Mich. 448, 56 N. W. Rep. 849.

⁶⁸ *Middleton's Ex'rs v. Middleton*, 35 N. J. Eq. 141.

⁶⁹ *Fanning v. Stinson*, 13 Iowa, 42, 48; *Kempton v. Walker*, 9 Vt. 191, 199; *Marsh v. Brace*, Cro. Jac. 334; *Beach v. Gray*, 2 Denio (N. Y.) 84; *Seaman v. Ward*, 1 Hilt. (N. Y.) 52; *Pitcher v. Tovey*, 4 Mod. 71; *Treackle v. Coke*, 1 Vern. 165; *Staines v. Morris*, 1 V. & B. 11.

⁷⁰ *Kimpton v. Walker*, 9 Vt. 191, 199.

ginal lease by the lessee the lessor attempts to make him pay rent in the first instance which has accrued while the assignee and not the original lessee was in possession. The ancient common law authorities are very contradictory on the question whether "yielding and paying a certain rent" is or is not an express covenant to pay rent,⁷¹ which creates a privity of contract between the lessor and the lessee. The modern view is that only an implied covenant is created by these words and that consequently the obligation to pay rent continues incumbent upon the lessee only while he is in the actual occupation and terminates upon his assignment of the lease and the entry of another.⁷² It has also been held that a covenant to pay rent generally during the term, but not promising in express words to pay it to the lessor or to any other particular person, is an implied covenant which though running with the land is no longer binding on an assignor of the term after the lessor has accepted rent from the assignee.⁷³ No form of language is required to constitute a covenant reserving rent. Any words which indicate that it was the intention of the parties that rent should be paid is usually sufficient. But the reservation of rent should be certain both as to the land and as to the time of payment, or should

⁷¹ *Kimpton v. Walker*, 9 Vt. 191, 199.

⁷² "The difficulty seems to have arisen from the indefinite use of the terms 'express' and 'implied' as having reference to the thing to be done, on the one hand, or the act of assuming the obligation on the other. Thus, the expression 'yielding and paying rent,' expresses the thing to be done, and, in that sense, the contract is express. Yet the words are introduced, in form, as a condition of the demise and are susceptible of such a construction. Still the question whether the lessee incurs a personal liability to be enforced by action, is not necessarily involved in the phraseology, but is left to legal construction or implication. It is true,

that by acceptance of the lease, the lessee becomes liable for the rent; but it is impossible for me to distinguish the origin of his liability from an ordinary case of an implied *assumpsit*, where the obligation arises, not from express undertaking but from voluntarily assuming a relation, to which the law attaches certain liabilities. Indeed, remove the seal from the lease in question, and we have a case for *assumpsit* for use and occupation; replace the seal and the action must be covenant, but the covenant in one case is as much implied as the promise in the other." *Kimpton v. Walker*, 9 Vt. 191, on p. 200.

⁷³ *Fanning v. Stimson*, 13 Iowa, 42, 49.

be of a character that the amount and date of payment can be ascertained. If rent is made payable annually or quarterly and the particular date is not stated upon which it shall be paid, the reservation is valid as the law will presume that the rent was to be paid on the last day of the rental period. So, if it is left optional with the tenant whether he shall pay the rent yearly, semi-annually or quarterly, the landlord by receiving the rent yearly, places a construction upon the language of the lease and cannot thereafter claim to receive it quarterly, unless with the consent of the tenant.⁷⁴

§ 333. **When rent is due.** In the absence of a special agreement by a tenant to pay his rent in advance, and if there be no statutory enactment requiring it to be paid in advance, rent is not payable until after the possession and occupation of the demised premises have been enjoyed by the tenant. Thus, where there is no express agreement that yearly or monthly rent shall be paid in advance, the rent is not due until the end of the rental period.⁷⁵ So, also, yearly rent which is payable quarterly, is paid at the end and not at the beginning of the quarter in the absence of a special agreement in the lease by the tenant to that effect.⁷⁶ The rent is payable at the end of the year or quarter,

⁷⁴ *Mallam v. Arden*, 10 Bing. 299. An agreement for the payment of the rent at so much per year usually makes rent payable yearly unless there is other language in the lease by which this presumption is rebutted. *Collett v. Curling*, 10 Q. B. 785, 16 L. J. Q. B. 390, 11 Jur. 890.

⁷⁵ *McFarlane v. Williams*, 107 Ill. 33, 42; *Dixon v. Niccolls*, 39 Ill. 372, 386, 89 Am. Dec. 312; *Dauchy Iron Works v. McKim Cas- ket & Mfg. Co.*, 85 Ill. App. 584; *Stowman v. Landis*, 5 Ind. 430; *Raymond v. Thomas*, 24 Ind. 476; *Cowan v. Henika*, 19 Ind. App. 45, 48 N. E. Rep. 809; *Indianapolis, etc., Co. v. First Nat. Bank*, 134 Ind. 127, 132, 33 N. E. Rep. 679; *Castleman v. Du Val*, 89 Md. 657, 43 Atl. Rep. 821; *Boardman v. Os-*

born, 23 Pick. (Mass.) 295, 299; *Ostner v. Lynn*, 57 Mo. App. 187; *Hilsendegen v. Scherck*, 55 Mich. 468; *Ridgley v. Stillwell*, 27 Mo. 128, 134; *Duryee v. Turner*, 20 Mo. App. 34; *Kistler v. McBride*, 65 N. J. Law, 553, 555; *Goldsmith v. Schroeder*, 87 N. Y. Supp. 558, 562; *Liebe v. Nicolai*, 30 Oreg. 364, 371, 48 Pac. Rep. 172; *Gibbs v. Ross*, 2 Head (Tenn.) 437, 440; *Donaldson v. Smith*, 1 Ashm. (Pa.) 197; *Menough's Appeal*, 5 Watts & S. (Pa.) 432; *Boyd v. McCombs*, 4 Pa. St. 146; *Gray v. Chamberlain*, 4 C. & P. 260; *Doe d. Mitchell v. Weller*, 1 Jur. 622; *Coomber v. Howard*, 1 C. B. 440.

⁷⁶ *Wood v. Partridge*, 11 Mass. 488; *Cotton Mfg. Corporation v. Melven*, 15 Mass. 268; *Vegely v. Robinson*, 20 Mo. App. 199; *Gar-*

even if payable in a share of crops raised on the land,⁷⁷ or in merchandise.⁷⁸ Though a tenant may abandon the premises before the expiration of a rental period and notify his landlord he will repudiate the lease, the landlord cannot sue for rent until it falls due under the lease.⁷⁹ This rule is the logical outcome and result of the principle that rent is payable and is to be paid by the tenant out of the profits and proceeds of the land and that it cannot therefore be paid until the profits have been gathered and realized by the tenant. Hence it also follows that if the tenant shall be ousted by an eviction before the rent is due the obligation to pay rent is at an end for the consideration or thing of value for which the rent was promised to be paid has failed.⁸⁰ Hence a covenant to pay rent upon a day mentioned therein creates no debt or legal obligation to pay the rent or any right on the part of the lessor to demand payment or to sue until the day named for payment has arrived.⁸¹ The rent may therefore never become due at all for the lessee may, before the date specified, surrender possession to the lessor, or the term may be merged, or the lessee may be evicted and, in either case, he will be absolved from the performance of his covenant to pay rent.⁸² In a lease which merely provides that it is for the term of eleven months, the rent to be payable on the twen-

vey v. Dobyns, 8 Mo. 213, 215; Schenck v. Vannest, 4 N. J. Law, 329; Leo Wolf v. Merritt, 21 Wend. (N. Y.) 331.

⁷⁷ Menough's Appeal, 5 Watts & S. (Pa.) 432; Boyd v. McComb, 4 Pa. St. 146; Sharpless' Estate, 8 Lanc. Bar. (Pa.) 125; King v. Bosserman, 13 Super. Ct. (Pa.) 480.

⁷⁸ Duryee v. Turner, 20 Mo. App. 34; Ostner v. Lynn, 57 Mo. App. 187. A provision that rent shall be paid quarterly in equal payments on the — requires that the rent be paid at the end of each quarter. Holt v. Nixon (C. C. A.), 141 Fed. Rep. 952.

⁷⁹ Nicholes v. Swift, 118 Ga. 922, 45 S. E. Rep. 708. A provision in a lease that anual rent shall be

paid in instalments on the first of each month does not mean that the rent is to be paid in advance unless it is so stated in the lease, but on the first of each month the rent which has accrued for the preceding month must be paid. Goldsmith v. Schroeder, 87 N. Y. Supp. 558, 562.

⁸⁰ Wood v. Partridge, 11 Mass. 488, 493; Bordman v. Osborn, 23 Pick. (Mass.) 295.

⁸¹ The lessee has the whole of the day on which rent falls due to make payment. Dalton v. Laudahn, 27 Mich. 529; Sherlock v. Thayer, 4 Mich. 355.

⁸² Wood v. Partridge, 11 Mass. 480, 493; Russell v. Fabyan, 28 N. H. 543, 545

tieth day of each and every month without using the words "in advance" the installments of rent are due and payable on the twentieth day which occurs at the end, instead of at the beginning of each month.⁸³ So a lease which requires rent to be paid in "monthly payments" the first payment to be made on the first day of the term, does not require that all payments shall be in advance on the first day of each month; and payments of rent subsequent to the first payment need not be in advance.⁸⁴ Neither the time of payment, nor the right to sue for rent which is due on a day specified is postponed by a stipulation that the landlord may enter,⁸⁵ or may distrain⁸⁶ after a period of default subsequent thereto.

§ 334. **Rent which is made payable in advance.** It is well settled both in England⁸⁷ and in the United States⁸⁸ that rent may legally be made payable in advance. Rent will never be presumed to be payable in advance without some evidence of intention by the parties that it shall be so. It is, however, not necessary that the lease shall expressly provide that the rent shall be paid in advance, if it appears from the language of the instrument, and the conduct of the parties, that it was their intention that rent shall be paid in advance.⁸⁹ The time fixed for the payment of the rent may always be determined from a consideration of the conduct and dealings of the parties to the lease, contemporaneous with or subsequent to its execution, where the lease is silent, ambiguous or uncertain.⁹⁰ Under an agreement for a lease "all conditions and covenant to be the usual ones," rent is not to be made payable in advance.⁹¹ A stipulation in a lease that if a lessee shall become embarrassed, or shall make an assignment for the benefit of his creditors, or shall be sold out at a sheriff's sale, the whole rent for the balance of the term shall become due and payable in advance, is

⁸³ *Castleman v. Du Val*, 89 Md. 657, 659, 43 Atl. Rep. 821.

⁸⁴ *Liebe v. Nicolai*, 30 Oreg. 364, 370, 48 Pac. Rep. 172.

⁸⁵ *Rowe v. Williams*, 97 Mass. 163, 165.

⁸⁶ *Van Rensselaer v. Jewett*, 5 Denio, 121, 128, 131, 2 N. Y. 136, 148.

⁸⁷ *Bulkley v. Taylor*, 2 T. R. 600; *Harrison v. Barry*, 7 Price, 690.

⁸⁸ *Giles v. Comstock*, 4 N. Y. 270, 272, 53 Am. Dec. 374.

⁸⁹ *Ellis v. Rice*, 195 Pa. St. 42.

⁹⁰ *Gore v. Lloyd*, 12 M. & W. 463, 13 L. J. Ex. 366. See, also, *Allen v. Bates*, 3 L. J. Ex. 39.

⁹¹ *Areade Realty Co. v. Tunney*, 101 N. Y. Supp. 593.

not against public policy, and will be sustained in disbursing the proceeds of the sheriff's sale of the tenant's property to the extent of giving the landlord priority for one year's rent, at least.⁹² In determining whether rent is or is not payable in advance it is not indispensable that the words "in advance" shall be used.⁹³ Thus the rent is payable in advance in a lease which provides that the first payment shall be made on the first day of a month some time after the date of the lease and that the yearly rent shall be paid in monthly installments of an equal amount commencing on the date mentioned.⁹⁴ A provision that the rent shall be payable in equal quarterly installments commencing from the 25th day of March then instant, means that the first quarter's rent is payable on that date and the future rent is payable in advance.⁹⁵ A provision in a lease for years that the lessee should, on his taking possession of the premises pay the amount of a quarter's rent which should be allowed him for the last quarter on the determination of the tenancy, is in its effect a stipulation for the payment of all rent in advance.⁹⁶ A receipt showing that rent has been paid in advance may in some cases be sufficient proof of a promise to pay rent in advance, even where the written lease is void and the tenant is in from year to year.⁹⁷ But a receipt showing that a particular installment of the rent has been paid in advance, while it is usually strong evidence of an agreement to pay rent in advance is never conclusive on the tenant. The provision that rent is to be paid in advance should be inserted in the lease, where the lease is in writing. A promise to pay in advance made during the term, on a separate consideration is *nudum pactum* and unenforceable.⁹⁸ Though evidenced by a writing an action of covenant or of debt may be maintained for rent which is by the lease payable in ad-

⁹² Platt v. Johnson, 168 Pa. St. 47.

⁹³ Sickels v. Shaw, 76 N. Y. Supp. 319.

⁹⁴ Ellis v. Rice, 195 Pa. St. 42, 45 Atl. Rep. 655.

⁹⁵ Hopkins v. Helmore, 3 N. & P. 453, 8 A. & E. 463, 1 W. W. & H. 386, 7 L. J. Q. B. 195, 2 Jur 856. The word "on" is substituted

by construction for the word "from."

⁹⁶ Finch v. Miller, 5 C. B. 428.

⁹⁷ Lee v. Smith, 9 Ex. 662, 664, 2 C. L. R. 1079, 23 L. J. Ex. 198, 2 W. R. 377, hinting also that the void lease may be referred to in order to ascertain how the rent was to be paid.

⁹⁸ Hasbrouck v. Winkler, 48 N. J. Law, 431, 6 Atl. Rep. 22.

vance as soon as it is payable, and so too rent payable in advance may be distrained for at once on accrual.⁹⁹ But the lessor cannot at once recover for use and occupation where the lessee fails to pay rent payable in advance.¹ He must sue on the covenant to pay rent or he must sue in assumpsit if there be no express covenant. The landlord cannot recover for use and occupation until after the use and occupation has been enjoyed. The tenant who abandons the premises on the first day of the month, if the rent for the month is payable in advance, is not relieved from the payment of the rent by the landlord's subsequent acceptance of the surrender, before the expiration of the lease.² So where rent is payable monthly in advance the landlord can recover a full month's rent though the tenant has been ousted for nonpayment of rent before the end of the period.³ So, where a lease provided that the rent should be paid in installments in advance with a privilege in the landlord to re-enter for breach of covenant without prejudice to any right which he might have, and the landlord re-enter on the failure of the tenant to pay rent, and also sued for the rent payable in advance the landlord was entitled to a judgment for the whole amount of the installment which was payable.⁴ But while the tenant whose rent is payable in advance cannot claim an abatement in the amount because of the fact that he is deprived of the use of his premises without the fault of his landlord, yet if having paid his rent in advance he is subsequently evicted by his landlord during the the period for which he has paid, he may recover as part of the damages for such eviction, the amount which he has paid for the time he had been out of possession. A tenant who has paid his rent in advance as required by the terms of his lease may, when

⁹⁹ *Russell v. Doty*, 4 Cow. (N. Y.) 576, 571; *Conway v. Starkweather*, 1 Denio (N. Y.) 113, 116, 2 Bae. Abr. tit. Distress (c). Where rent is payable in advance, the landlord may distrain at any time between the commencement of the rental period and its end. *Witty v. Williams*, 12 W. R. 755.

¹ *Angell v. Randall*, 16 L. T. 489.

² *Conklin v. White*, 17 Abb. New

Cases (N. Y.) 315, 3 How. Pr. (N. S.) 507.

³ *McNulty v. Duffy*, 59 N. Y. Supp. 592; *Bernstein v. Heinemann*, 51 N. Y. Supp. 467; *Kahn v. Rosenheim*, 68 N. Y. Supp. 856; *Stern v. Murphy*, 102 N. Y. Supp. 797.

⁴ *Ellis v. Rowbotham*, 69 Law. J. Q. B. 379; (1900) 1 Q. B. 740, 82 Law T. (N. S.) 191, 48 Weekly Rep. 423.

he is evicted during the rental period, recover the rent for that portion of the term during which he has not enjoyed the possession of the premises. In such an action however the tenant may recover the rent which the landlord may have received from another tenant to whom the landlord may have leased the premises after the action has begun.⁵ After a lease is declared to be void the liability of the tenant who has surrendered possession to pay rent, in advance is at an end. If he has given notes in advance for the payment of the rent the collection of the notes cannot be enforced by the landlord⁶ as the consideration has failed. If the proper application is made in an action in which the lease is declared void the court, acting upon equitable principles will order the notes for rent to be delivered up and cancelled, and may enjoin the landlord from negotiating the same and punish him for contempt for his disobedience to its mandate. Where the rent is payable in advance the tenant has until the last minute of the day on which the rent falls due to make payment so that an action begun on that day is premature.⁷ If by a lease with a privilege of a renewal the rent is made payable in advance and the lease is renewed, the rent in the new lease will also be payable in advance in the absence of a provision to the contrary.⁸ The landlord will always be limited in his recovery in an action for rent to the rent which is due at the beginning of the action.⁹ Hence if an installment of the rent falls due pending the action it cannot be included in a judgment which is rendered in the action. A tenant, whose rent is payable in advance, cannot recover money deposited by him with the landlord as security for the rent which is in amount exactly equal to a month's rent, where he has not paid his rent in advance though the landlord has, in consequence of the failure to pay rent in advance, evicted him during the month and resumed possession of the premises.¹⁰

§ 335. **The place for the payment of the rent.** The tenant must seek out the landlord and must pay or tender him the

⁵ *Stautz v. Protzman*, 84 Ill. App. 434.

⁶ *Crockett v. Althouse*, 35 Mo. App. 404.

⁷ *Mack v. Burt*, 5 Hun (N. Y.) 28; *Insurance Co. v. Myers*, 4 Lanc. Bar. (Pa.) 151.

⁸ *Stose v. Heissler*, 120 Ill. 433, 11 N. E. Rep. 161.

⁹ *Stanley v. Turner*, 68 Vt. 315, 35 Atl. Rep. 321.

¹⁰ *Coro v. Greenwald*, 102 N. Y. Supp. 752.

rent where the tenant has covenanted to pay rent on a day certain and the place of payment is not specifically mentioned.¹¹ This rule is based upon the theory that the covenant of the lessee to pay rent is a personal covenant which must be performed personally by the covenantor. But in the United States it has been repeatedly held that in the absence of an express provision in the lease to the contrary rent is payable by the tenant on the land,¹² though the rent be payable not in money but in specific articles alone,^{12a} or in money or in specific articles at the election of the landlord.¹³ Where the rent is payable at either one of two places both within the same county according as the lessor may direct, it is not necessary for the lessor to prove that he directed the lessee to pay it at either place. If the lessor fails to direct where the rent shall be paid the lessee may protect himself by a payment or tender of the rent at either place.¹⁴ If rent is payable at some place in a city mentioned in the lease as the lessor may direct, it is the duty of the lessee to ascertain where the lessor desires the rent to be paid. The lessor need not prove in an action against the tenant on the covenant to pay rent, that he has directed the tenant where it shall be paid; though if he has not done so a tender of the rent at any place in the city where the lessor could be found would be sufficient;¹⁵ or, perhaps the rent would then be properly payable upon the land.¹⁶

¹¹ *Haldane v. Johnson*, 8 Ex. 689, 22 L. J. Ex. 264, 17 Jur. 937.

¹² *Livingston v. Miller*, 8 N. Y. 283, 289, 11 N. Y. 80, 91; *Walter v. Dewey*, 16 Johns. (N. Y.) 222; *Hinter v. Le Conte*, 6 Cow. (N. Y.) 728; *Hugh v. Lillibridge*, 8 D. R. (Pa.) 358, 22 Pa. C. C. 185.

^{12a} *Fordyce v. Hathorn*, 57 Mo. 120.

¹³ *Walter v. Dewey*, 16 Johns. (N. Y.) 222.

¹⁴ *Livingstone v. Miller*, 11 N. Y. 80, 85.

¹⁵ *Lush v. Druse*, 4 Wend. (N. Y.) 313.

¹⁶ *Remsen v. Conklin*, 18 Johns. (N. Y.) 448. In this case and in *Lush v. Druse*, 4 Wend. (N. Y.) 313, and in *Livingstone v. Miller*,

11 N. Y. 80, rent was payable in wheat, hens and "in two days' riding" to be delivered in Albany while the farms for which the rent was payable were located many miles from that city. Under such circumstances where the rent consists of ponderous articles expensive to move about and care for, it would seem but fair and just to permit a tenant to make a tender or to hold himself ready to deliver such articles on the land where the landlord neglects to indicate in what particular portion of a market town fifty miles away he will be ready to receive the articles on the rent day. See opinion of Selden, J., in *Livingstone v. Miller*, 11 N. Y. 80, on pages 87

§ 336. **To whom rent should be paid.** The tenant must pay his rent to the landlord or to some person who is directly and expressly authorized by the landlord to receive it. Equity will not relieve a tenant from his own error in paying his rent to a person not entitled to receive it. The tenant cannot maintain a bill to set off his erroneous payment against his landlord.¹⁷ Under the general rule that the right to the payment of the rent follows the reversion, and that the right to collect it passes to the person who takes the reversion if a lessor owning the fee reserves rent to himself and his wife, the reservation is good as long as the lessor lives, but upon his death, the wife being a stranger to the title, ceases to have any interest in the rent.¹⁸ At the common law and by the ancient authorities a reservation of rent to the heirs of the lessor during his life was invalid as rent, and could not be distrained for, and doubtless even in modern times, under modern rules would be unenforceable as a contract because of the uncertainty of the persons to whom it was to be paid.¹⁹ On the other hand, a reservation of rent to the heirs of the lessor contained in a lease that was not to go into effect until the death of the lessor, would be good and valid for the reason that on his death the reversion would pass to them, and they would be entitled to collect the rent by operation of law aside from the terms of the lease.²⁰ The rent however it be reserved follows the reversion. So where one seized in fee leases

to 92. Some of the English cases have made a distinction as to the necessity for the payment of the rent on the land between a lease in which the rent is reserved generally, and a lease where the lessee covenants to pay the rent without mentioning a particular place where he shall pay it; in the latter case the covenant has been regarded as a personal covenant to pay a sum of money on a day certain and the obligation is on the covenantor to seek out the person to whom he has promised to pay the money whenever he may be in order to pay or to tender him the money. *Haldane v. Johnson*, 8 Exch. 689. The

distinction is of little importance and is only recognized in the case cited. The question as to the place of the payment of rent arises only where the non-payment results in a forfeiture on a breach of condition, or where the question of a valid tender of the rent arises in an action of debt or covenant to recover the amount due.

¹⁷ *Pratt v. Keith*, 33 L. J. Ch. 592, 10 Jur. (N. S.) 305, 10 L. T. 15, 12 W. R. 394, 3 N. R. 264.

¹⁸ Co. Litt. 99b, 213b; *Whitlock's Case*, 8 Coke, 69b.

¹⁹ Co. Litt. 99b, 213b; *Oates v. Frithe*, 2 Rolle's Abr. 447.

²⁰ Co. Litt. 99b, 213b; *Oates v. Frithe*, 2 Rolle's Abr. 447.

for years reserving rent during the term to the lessor, his executors, administrators, and assigns, and the lessee agrees to pay it, the heir or devisee of the reversion on the death of the lessor is entitled to the rent and may maintain an action on the covenant accordingly.²¹ Where a person owning the fee settles land on himself for life, remainders to others, reserving to himself a power to lease which he subsequently exercises reserving rent to himself, his heirs and assigns, the remaindermen and not the heirs shall have the rent.²² The same rule applies where the owner of the fee settles a life estate on another, remainder to others with a power to lease in the life tenant.²³ The principles upon which this construction is had is that the lease though executed by a life tenant must be regarded in theory as emanating from the person who created the power to lease and that the remaindermen were in fact the assigns of the grantor or deviser although not of the person *i. e.* the life tenant who executed the lease. As to the heirs of the life tenant they are not considered in relation to the reservation of rent at all as they would never have any interest in the land. Even though the life tenant in executing the lease under the power reserved rent to himself and his heirs it is not material. A payment made to a person who is not entitled to receive the rent on behalf of the landlord, does not discharge the rent.²⁴ Thus, a tenant who pays his rent in advance to a receiver in a foreclosure proceeding must pay the rent to the purchaser at the sale.²⁵ It is the duty of the tenant to ascertain whether the person to whom he pays his rent is his landlord, or is duly authorized as his agent for the fact that he pays it to one who is not his landlord, will not prevent the latter from subsequently recovering it. A payment of rent to the agent of the landlord duly authorized to collect it, is

²¹ *Sacheverell v. Froggatt*, 2 W. Saund. 367a, 371, 2 Leu. 13, T. Raym. 213, 1 Vent. 148, 160, 2 Keble, 798, 819, 833, 839. See, also, *Brook v. Biggs*, 5 L. J. C. P. 143, 2 Bing. (N. C.) 572.

²² *Greenaway v. Hart*, 14 C. B. 340, 2 C. L. R. 370, 23 L. J. C. P. 115, 18 Jur. 449, 2 W. R. 702.

²³ *Whitlock's Case*, 8 Co. Rep. 69b, 70b; *Hotley v. Scot*, Lofft,

316; *Isherwood v. Oldknow*, 3 M. & Sel. 382; *Berry v. White*, Bridgman, 82.

²⁴ *Williams v. Bartholemew*, 1 Bos. & Pul. 326.

²⁵ *American Mortg. Co. v. Merriek Const. Co.*, 100 N. Y. Supp. 561, 50 Misc. Rep. 464, holding also the purchaser cannot obtain such rents by an application in surplus proceedings.

sufficient and a tender of the rent to such agent will also be sufficient.²⁶ The agency to receive the rent thus created may be revoked at any time by the landlord, provided the agency is not coupled with an interest, but where a person has been regularly receiving rents as agent of a landlord, and giving receipts therefor, the notice of the revocation should be brought to the knowledge of the tenant, and if this be not done the subsequent payment by the tenant to the agent will be binding on the landlord. Where rent has been customarily paid in advance by the tenant, the tenant who has paid in advance is not liable for that rent to the grantee of the lessor, though the latter has no notice of such payment, and the lease does not provide for advance payments.²⁷ But the general rule undoubtedly is that the voluntary payment of rent by the tenant before it is due, does not operate to discharge his liability, and if, before the rent is actually due, the landlord transfers the premises, his grantee may recover from the tenant rent accruing subsequently to the sale, though the tenant has in fact paid it to the former owner.²⁸ The payment of the rent not yet due by the tenant to the lessor who has mortgaged the premises after making the lease is not good as against the mortgagee who has notified the lessee before the rent became due that it must be paid to him.²⁹ So it has also been held that if there be a clause for re-entry for non-payment of rent, rent paid before the day when it was due under the terms of the lease, will not avoid a forfeiture if proper steps to enforce it had been taken.³⁰ The same rule which renders the tenant liable to a purchaser for rent paid in advance applies to the rights of a purchaser at an execution sale. Thus where a tenant accepted drafts on him by his landlord in anticipation of rent which was not due at the time of the acceptance of the drafts, the tenant was compelled to pay the rent which subsequently accrued to a purchaser at a sheriff's sale, though the drafts accepted by the tenant covered rent paid in advance for a period which had not expired at the date of the payment.³¹ All this is technical and is

²⁶ *Goodland v. Blewelt*, 1 Camp. 477.

²⁷ *Stone v. Patterson*, 19 Pick. (Mass.) 476.

²⁸ *William Clun's Case*, 10 Coke, 127b.

²⁹ *De Nicols v. Saunders*, 39 L. J. C. P. 297, L. R. 5 C. P. 589, 22 L. T. 661, 18 W. R. 1106.

³⁰ *Cromwell v. Andrews*, Cro. Eliz. 15.

³¹ *Martin v. Martin*, 7 Md. 363.

based on strict common law principles for in equity an advanced payment made before the time fixed in the lease, will be considered; and, if all the parties are before the court, the matter will be adjusted according to fairness and equity, and if the rights of the parties permit the payment in advance will be regarded as a discharge of the debt for rent.³²

§ 337. **Rent made payable to persons other than the landlord.** Where the payment of rent is specially reserved by a covenant, it may be reserved directly to the person entitled to the fee. While it is competent and proper for rent to be reserved and made payable by the lease to persons other than the landlord, such reservation does not in strictness of language create rent, and the person to whom this reservation is made cannot maintain a distress though such person, however, may maintain an action of debt against the tenant for the rent,³³ and in modern times he may sue the tenant for rent on the covenant without proving any express assignment of the rent to him.³⁴ Such leases come under the general rule of the law of contracts that where one by an unsealed contract makes a promise to another for the benefit of a third person, the latter may recover against the promisor though no consideration has moved from him.³⁵ This rule is confined in its operation to contracts

³² *Rockingham v. Penrice*, 1 S. W. Rep. 346.

³³ *Gilbert on Rents*, 24.

³⁴ *Toan v. Pine*, 60 Mich. 385, 27 N. W. Rep. 557; *Frontin v. Small*, 2 Ld. Raym. 1418; *During v. Farington*, 1 Mod. 113. If the lessee undertakes to pay an annual sum by his deed, such undertaking constitutes a right to it, and the law in all cases gives a remedy adequate to the right. A tenant who has expressly agreed to pay the rent to a third person for a period which is specified in the lease or some other agreement will be bound to do so. The promise if it is based upon a sufficient consideration may be enforced by the third person against the tenant.

After the period agreed on has expired the tenant is under no obligation, either express or implied, to pay his rent to the third person and he may thereafter pay his rent to his landlord where he remains in possession. *Hodges v. Waters*, 124 Ga. 229, 1 L. R. A. (N. S.) 1181, 52 S. E. Rep. 161.

³⁵ *Hendrick v. Lindsay*, 93 U. S. 143, 23 Law Ed. 855; *Thompson v. Dearborn*, 107 Ill. 87; *Carnahan v. Tousey*, 93 Ind. 561; *Carnegie v. Marrison*, 2 Met. (Mass.) 381; *Cubberly v. Cubberly*, 33 N. J. Eq. 82; *Lawrence v. Fox*, 20 N. Y. 268; *Barker v. Bradley*, 42 N. Y. 316; *Little v. Banks*, 85 N. Y. 258; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. Rep. 58; *Schneider v.*

not under seal. For a contract under seal cannot generally be sued on by a person for whose benefit it was made unless he is a party thereto.³⁶ The payment of the rent to a stranger without the consent or request of the landlord does not bind the landlord.³⁷ But where a landlord has by his written order to pay rent to a third person acknowledged that such person is entitled to receive the rent and the tenant, relying upon such conduct, has actually paid the rent to the third person, the landlord is estopped to recover the rent from the tenant.³⁸ If the landlord directs a tenant to pay rent to some third person to whom the landlord is indebted and the tenant, for any reason, fails to do so, the landlord may recover the rent from the tenant. Thus, where by the terms of a lease the lessee is to pay the rent in discharge of the lessor's debts to certain creditors of the lessor who are named, and the lessor directs him to do so and he fails either to pay the rent to the creditors or to promise them payment, and they do not accept this provision as a discharge of their debts, the title to the rent remains in the lessor and the lessee is his debtor for the full amount of rent unpaid.³⁹ But where a tenant by the implied consent of his landlord, pays the rent to a third party with whom the landlord is in litigation over the title to the rent, the landlord is thereafter precluded from recovering from his tenant the rent so paid.⁴⁰ An agreement by a landlord that the tenant may retain a certain portion of each year's rent until a debt due from the landlord to the tenant is paid which is contained in a writing separate from the lease, may be pleaded at law in an action against the landlord on the debt as a release *pro tanto*. This, however, is only for convenience as the agreement is not a release. And where the tenant having made such an agreement, specifically bequeathes his term, his bequest does not carry to the legatee of the term the benefit of the agreement but that passes to the executors of the tenant

White, 12 Oreg. 503, 8 Pac. Rep. 652.

³⁶ Millard v. Baldwin, 3 Gray (Mass.) 484; Crowell v. Currier, 27 N. J. Eq. 152. *Contra*, Rogers v. Gosnell, 51 Mo. 466; Bassett v. Hughes, 43 Wis. 319.

³⁷ Gibbons v. Hamilton, 33 How. Pr. (N. Y.) 83, 86.

³⁸ Winterink v. Maynard, 47 Iowa, 366.

³⁹ Burt v. Hurlbut, 16 Vt. 292, 293.

⁴⁰ Winterink v. Maynard, 47 Iowa, 366.

who may interpose it as a set-off in any action brought against them on the covenant of their testator to pay rent.⁴¹

§ 338. **Rent payable in instalments.** Instalments of rent may be recovered as they fall due, or the landlord may let the instalments accumulate and sue for several in the aggregate or he may sue for each instalment as it falls due. He is not required to wait for any particular time to sue.⁴² The general rule of the law of contracts that where money is to be paid in instalments, some of which are due after something has been done and others are due before a thing has been done, the doing of the latter by the payee is not a condition precedent to the payment of the money, is applicable to a case where rent is payable in instalments and the lessor has expressly covenanted to perform some act under the lease which either expressly or of necessity may or must be done after the payment of an instalment of rent. A lessor may sue at once for an instalment of rent which is due on the first or any other day of the month and the lessee cannot defeat a recovery by showing that the lessor had agreed to furnish heat or steam power or to repair or to improve during that month. He cannot make the lessor wait for the rent until the month is ended, in order to ascertain whether the lessor will perform his covenant, for where the rent is expressly payable in advance, the lessee is conclusively precluded from claiming that the performance of any act which is to be done thereafter is a condition precedent to his liability for the payment of the rent in advance.⁴³ A judgment in an action to recover one instalment of rent, though it shall dismiss the action upon the merits, is not of necessity a bar to a subsequent action to recover another instalment which falls due there-

⁴¹ *Ledger v. Stanton*, 2 John. & H. 689, 9 W. R. 848. Where a lease of a husband's lands provided that the rent accruing after his death should be paid to his wife for her support, such provision was invalid as an attempted testamentary devise, so that the wife was not entitled to the rent so accruing. *Murray v. Cazier*, 23 Ind. App. 600, 53 N. E. Rep. 476.

⁴² *Consolidated Coal Co. of St. Louis v. Peers*, 39 Ill. App. 453;

Racke v. Anheuser Busch Brewing Ass'n (Tex.), 42 S. W. Rep. 774. The instalments carry interest from the dates upon which they fall due. *Lane v. Ruhl*, 103 Mich. 38, 45, 61 N. W. Rep. 347.

⁴³ *Hurliman v. Seckendorf*, 10 Misc. Rep. 549, 550, 31 N. Y. Supp. 443, 444; *Trenkman v. Schneider*, 56 N. Y. Supp. 770, 772, 26 Misc. Rep. 695, reversing 51 N. Y. Supp. 232, 23 Misc. Rep. 336.

after. The prior judgment may be a bar if it dismisses the action upon a defence which can properly and legally be pleaded in an action on a subsequent instalment. This would be the case where the first action was dismissed upon the merits because of the absolute invalidity of the lease and particularly if the validity of the lease were the only material issue in the first action.⁴⁴ The tenant can then in the subsequent action for an instalment thereafter accruing, plead that the lease has been pronounced invalid in the prior action, and that he has surrendered it, and no recovery can be had against him. If, however, the defence in the first action was one that did not go to defeat the whole of the plaintiff's case, the judgment in favor of the tenant in an action for the first instalment cannot be pleaded in the subsequent action. For example if the first action were defeated because the court was satisfied that there had been a surrender by the tenant and an acceptance by the landlord, the judgment therein would be a bar to an action on a subsequent instalment, but the defense of payment or of a breach of some covenant might be a good defense in one action and yet amount to nothing as to an action on some subsequent instalment.⁴⁵ But, if the first action for an instalment was defeated upon a ground of defense which denied the right of action and a trial was had upon the merits of that defense, a judgment dismissing the first action could be pleaded in bar to any subsequent action brought for a subsequent instalment payable under the same lease.⁴⁶ A judgment in an action for an instalment of rent does not bar an action brought thereafter to recover prior instalments, when the latter action was pending at the time the action in which the judgment was rendered was commenced, though it was discontinued before the judgment in that action was rendered.⁴⁷ A judgment by default in an action for rent, the

⁴⁴ *Dolan v. Scott*, 25 Wash. 214, 65 Pac. Rep. 190.

⁴⁵ The rule that in an action for an instalment of rent due a judgment that a lease is valid or otherwise is conclusive in an action for a subsequent instalment does not apply to a lease under which the tenancy may be terminated at the end of any year. *Snowhill v. Dia-*

mond Plate Glass Co. (Ind. App. 1906), 77 N. E. Rep. 412.

⁴⁶ *Danziger v. Williams*, 91 Pa. St. 234; *Burdick v. Cameron*, 42 N. Y. Supp. 78; *McClung v. Condict* (Minn.), 6 N. W. Rep. 399.

⁴⁷ *Kieley v. Kahn*, 98 N. Y. Supp. 774. In an action for rent a prior judgment and record for rent under the same lease is not conclu-

record in which action does not show the nature of the tenancy, whether by the year or by the month, that not being necessary to be shown in the action is not *res adjudicata* in a subsequent action or summary proceeding by the landlord to dispossess the tenant.⁴⁸ A judgment for one instalment of rent due on a lease for a year is *res adjudicata* to all defenses which might have been urged in the action. It follows, therefore, that the tenant in an action to recover a subsequent instalment cannot urge an eviction or a trespass which might have been properly urged in the prior action.⁴⁹

§ 339. **The tender of the rent by the lessee.** If the rent is payable on a day certain, the tenant is bound to make a tender on the precise day.⁵⁰ If, having made a legal and proper tender the landlord refuses to accept the tenant is discharged from the consequences of a failure to pay his rent. The landlord cannot then recover the possession of the premises for non-payment of the rent. A mere offer to pay the rent is not a tender. The tenant must actually produce the money and hand it to the landlord or place it where he can easily receive it unless the landlord by some act or declaration on his part shall conclusively show that he does not mean to accept it.⁵¹ The production of the money is dispensed with in a case where the tenant comes to the landlord with a voucher in his hand to pay the rent, and the landlord on its being read to him declines to take it and states that it will be unnecessary to produce the money.⁵² The tenant must

sive as to the length of the term where the judgment and record do not indicate the nature of the controversy. *Dickey v. Heim*, 48 Mo. App. 114.

⁴⁸ *Rothstein v. Steinbugler*, 102 N. Y. Supp. 470.

⁴⁹ *Pierson v. Hughes*, 102 N. Y. Supp. 528.

⁵⁰ *Dewey v. Humphrey*, 5 Pick. (Mass.) 187. Unless the day is Sunday when he may legally tender the rent on the next day. *Warne v. Wagoner* (N. J. Ch. 1888), 15 Atl. Rep. 307.

⁵¹ *Hornby v. Cramer*, 12 How. Pr. (N. Y.) Rep. 490, 494; *Bakeman v. Pooler*, 14 Wend. (N. Y.)

637; *Currie v. White*, 45 N. Y. 822, 833; *Finch v. Brook*, 1 Bing. (N. C.) 259; *Thomas v. Evans*, 10 East, 101.

⁵² *Westmoreland Cambria Nat. Gas Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. Rep. 724. An offer by the tenant to deliver to the landlord sufficient merchandise to pay the rent was held good in *Browne v. Clarke*, 35 La. Ann. 290. The tender of certain articles in which rent is to be paid on the rent day is a good tender, though their real value then was greater or less than their price which was specified in the lease. *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277.

tender the amount of rent due in lawful money. An offer of a check or an offer to draw a check in payment of the rent is not sufficient.⁵³ A tender ought to be made directly to the landlord in person though it may be a valid tender if it is made to an agent of the landlord who is authorized to receive the rent.⁵⁴ The tender must be absolute and asking for a receipt will invalidate it as a tender.⁵⁵ A tender of rent with the words "here is your quarter's rent" is a good tender as it does not require the landlord to make any admission of the amount due as a condition of its receipt by him.⁵⁶ An absolute refusal by a landlord to receive the rent tendered is a waiver of the tender.⁵⁷ If the landlord refuses to receive the rent upon a ground specified, he cannot subsequently raise any other objection which had he then stated it, might have been obviated by the tenant.⁵⁸ The rent having been tendered and refused as not having been tendered in time, the objection cannot afterwards be made that it was not tendered in money.⁵⁹ The tender of course does not pay the debt but merely stops the running of interest and saves the tenant from the consequences of a forfeiture which may result from the non-payment of the rent. A tender of a sum of money, which is less than the rent demanded by the landlord upon the condition that a receipt in full for rent shall be given or that it shall be accepted in full payment of all rent due, is not a valid tender. If the tenant shall insist upon a receipt in full the tender may be refused as insufficient and invalid and the landlord may then insist upon the unconditional payment of the sum he demands.⁶⁰ A tender by the tenant of the rent which is due with

⁵³ *Hague v. Powers*, 25 How. Pr. (N. Y.) 17, 30 Barb. (N. Y.) 42; *Bank, etc., v. Trumbull*, 35 How. Pr. (N. Y.) 8, 4 Abb. Pr. (N. Y.) Rep. 83, 53 Barb. (N. Y.) 450.

⁵⁴ *Hargous v. Lahens*, 3 Sandf. (N. Y.) 313; *Wilmot v. Smith*, 3 Car. & P. 453; *Kirton v. Braithwaite*, 1 Mee. & Wel. 310; *Bingham v. Allport*, 1 N. & M. 398.

⁵⁵ *Roosevelt v. Bull's Head Bank*, 45 Barb. (N. Y.) 579, 583; *Griffith v. Hodges*, 1 Car. & P. 419; *Glascott v. Day*, 5 Esp. 48; *Finch*

v. Miller, 5 C. B. 428, 435; *Sutton v. Hawkins*, 8 Car. & P. 259.

⁵⁶ *Jones v. Bridgman*, 39 L. T. 500.

⁵⁷ *Stone v. Sprague*, 20 Barb. (N. Y.) 509, 515; *Dana v. Fiedler*, 1 E. D. Smith (N. Y.) 463; *Slingerland v. Morse*, 8 Johns. (N. Y.) 474, 476; *Everett v. Saltus*, 15 Wend. (N. Y.) 474.

⁵⁸ *Hull v. Peters*, 7 Barb. (N. Y.) 331, 7 Abb. Pr. (N. S.) 244.

⁵⁹ *Duffy v. O'Donovan*, 46 N. Y. 223.

⁶⁰ *Thayer v. Brackett*, 12 Mass.

interest⁶¹ and costs to the date of the tender, when made pending a dispossessory action which is based upon the default of the tenant in the payment of rent, will defeat the action. If the tender is not accepted by the landlord the money should be paid into court at once and if this be done pending the action and before answer, it will stop the running of costs in case the landlord refuses to accept the money and the judgment is rendered in his favor. The general rules applicable to a tender pending an action will be recognized in the case of a tender of rent made by a tenant who is being sued in a possessory action, subject to the provisions of the local statutes. The plea of tender must show that interest on the rent was included in the amount tendered and that the tenant had the money in court.⁶² It is the duty of the tenant to seek the landlord in order to pay or to tender the rent. He will be allowed a reasonable time to find him where he has frequently attempted to see him and the landlord has intentionally avoided him.⁶³ A tender or offer of payment of the rent may extinguish the tenant's liability. A statute which provides that where a tender is refused, the money may be deposited in the name of the creditor in a bank, notice of the deposit given to him, will be strictly construed. The mere deposit of rent in the bank after it is demanded by the landlord, and a refusal and neglect to pay are not a fulfilment of the requirements of the statute, unless it is proved that the money was offered to the landlord, or that he was notified of the deposit or having knowledge of it acquiesced in it.⁶⁴

§ 340. **Apportionment of rent between successive landlords.** In the absence of an express agreement, or a statute permitting apportionment, there is no apportionment of rent, which by the

450, 452; *Loring v. Cooke*, 3 Pick. (Mass.) 48, 51; *Brooklyn Bank v. De Graw*, 23 Wend. (N. Y.) 342; *Hepburn v. Auld*, 1 Cranch (U. S.) 321; *Griffith v. Hodges*, 1 Car. & P. 420; *Jennings v. Magor*, 6 Car. & P. 237; *Peacock v. Dickenson*, 2 Car. & P. 51; *Chenimant v. Thornton*, 2 Car. & P. 50.

⁶¹ *Ralph v. Lomer*, 3 Wash. St. 401, 28 Pac. Rep. 401.

^{61a} *George v. Mahoney*, 62 Minn. 370, 64 N. W. Rep. 911.

⁶² *Ralph v. Lomer*, 3 Wash. St. 401, 28 Pac. Rep. 760.

⁶³ *Young v. Ellis*, 91 Va. 297, 21 S. E. Rep. 480.

⁶⁴ *Owen v. Herzikoff* (Cal. App. 1906), 84 Pac. Rep. 274. In Illinois a tender of the rent to the landlord or his agent within the five days provided by the statutory notice to quit will defeat the forfeiture of the lease. *Lasher v. Graves*, 124 Ill. App. 646.

terms of the lease is payable at certain intervals. Annual or quarterly payments of rent are not, at common law, apportionable between the parties where the reversion is transferred by a lessor between the days for the payment of the rent. There is no apportionment as respects time and the right to collect the next annual or quarterly payment of rent which becomes due passes to the grantee of the reversion.⁶⁵ To apportion the rent would, it has been said, expose a tenant to several processes of distress for a thing which was originally entire and he ought not to be compelled to pay rent in different parcels and to several landlords when he contracted to pay one entire sum as rent to one person.⁶⁶ Hence if a tenant for life or any tenant who has a terminable estate dies but one day before the rent reserved in a lease by him becomes due the rent was lost at common law for there is none who can collect it after his death. The executor of the lessor could have no action on the covenant to pay rent as it was not broken during the life of the lessor and as the covenant to pay rent runs with the land the executor could have no action for a breach after the death of the lessor. The executor of the life tenant cannot sue for use and occupation for there was a lease between the parties. Nor on the other hand could the reversioner or remainderman recover the rent which accrued during the life of the life tenant so that under such circumstances the lessee

⁶⁵ *English v. Key*, 39 Ala. 113; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. Rep. 74, 77; *Peck v. Northrop*, 17 Conn. 217; *Sampson v. Grimes*, 3 Har. (Del.) 82; *Breeding v. Taylor*, 13 B. Mon. (Ky.) 477; *Robinson v. Deering*, 56 Me. 357; *Cameron v. Little*, 62 Me. 550; *Anderson v. Robbins*, 82 Me. 422, 425, 19 Atl. Rep. 910, 8 L. R. A. 568; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; *Earle v. Kingsbury*, 3 Cush. (Mass.) 206, 208; *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 261; *Adams v. Bigelow*, 128 Mass. 365; *Emmes v. Feeley*, 132 Mass. 346; *Fitchburg Man. Co. v. Melvin*, 15 Mass. 268; *Wood v. Partridge*, 11 Mass. 493; *Perry v. Aldrich*, 13 N. H. 343, 350, 38 Am.

Dec. 493; *Russell v. Fabyan*, 28 N. H. 543, 545; *Marshall v. Moseley*, 21 N. Y. 280; *Mayor of New York v. Ketchum*, 67 How. Pr. (N. Y.) 161, 166; *Van Wicklen v. Paulsen*, 14 Barb. (N. Y.) 654; *Zule v. Zule*, 24 Wend. (N. Y.) 76, 35 Am. Dec. 600; *Bank v. Wise*, 3 Watts (Pa.) 394; *William Clun's Case*, 10 Coke, 127, Cro. Jac. 310; *Paget v. Gee*, Ambl. 198; *Burns' Justice, Distress*, sec. 18; *Jenner v. Morgan*, 1 P. Wms. 392; *Edwards v. Countess of Warwick*, 2 P. Wms. 176; *Hawkins v. Kelly*, 8 Ves. 308; *Countess of Plymouth v. Throgmorton*, 1 Salk. 65; *Birch v. Wright*, 1 T. R. 378.

⁶⁶ *Stewart v. Perkins*, 3 Oreg. 508, 511.

paid no rent.⁶⁷ The rule of the common law holding against an apportionment of the rent though in many cases working injustice to the owners of reversions was scrupulously followed in equity.⁶⁸ It has, however, been abrogated by express statutes in almost every state in the Union. These statutes though in derogation of the common law are usually construed liberally with a view to the peculiar exigencies of modern life and present conditions. They are not retroactive and generally apply only to leases which are executed subsequent to their passage.⁶⁹ The English statute⁷⁰ applies to cases in which the interest of the person interested in the rents is terminated by his death, or by the death of another person, but it does not apply to the case of a tenant in fee nor does it provide for the apportionment of rent between the real and personal representatives of such persons whose interest is not terminated at his death.⁷¹ Money which is paid as rent will be apportioned after the death of the lessor though by his death the lease became void and the tenants are simply tenants at will or at sufferance. This principle is applicable as regards the executor of a life tenant who has made a lease for years which is terminated by his death,⁷² or to a lease by a tenant in tail.⁷³ Where the lessor owns land in fee and land for life, and he leases both lands for a term at an entire rent and the lease of the land which he holds for life, is void on his death because he had no power to make it though not for the land which he held in fee, the rent may be apportioned.⁷⁴ A lease in which an option to purchase during the term is conferred upon the lessee, is a

⁶⁷ At common law, if a tenant for life died before the day on which the rent became due, where the lease determined by the death of the tenant for life, his executors could not claim an apportionment of the rent, nor could the remainderman or reversioner claim that part of it which accrued during the life of the tenant for life. Com. Dig. Rent, 3 Cruise, 350.

⁶⁸ *Mayor of New York v. Ketchum*, 67 How. Pr. (N. Y.) 161, 167.

⁶⁹ *Mayor v. Ketchum*, 67 How. Pr. (N. Y.) 161, 167.

⁷⁰ 4 and 5 Will. 4, c. 22, § 2.

⁷¹ *Brown v. Amyot*, 3 Hare, 173, 13 L. J. Ch. 232, approved in *Beer v. Beer*, 12 C. B. 60, 21 L. J. C. P. 124, 16 Jur. 223.

⁷² *Hawkins v. Kelly*, 8 Ves. 308.

⁷³ *Whitfield v. Pindar*, cited *Hawkins v. Kelly*, 8 Ves. 308; *Strafford v. Wentworth*, 9 Mod. 21, Pre. Ch. 555, 1 P. Wms. 180; *Rockingham v. Penrice*, 1 P. Wms. 179.

⁷⁴ *Doe d. Vaughan v. Meyler*, 2 M. & S. 276, 15 R. R. 244.

lease which is dependent as to its duration upon a contingency. If the lessee exercises the option the lease is at an end. Where he does so during a rental period, he remains liable for the rent for that portion of the period which has expired, where a statute provides that where land is held by a person under a lease which terminates upon a contingency, the landlord may recover a part of the rent in proportion to the time which has expired.⁷⁵

§ 341. **Apportionment among the several assignees of the lessor.** Where a tract of land while it is under lease is severed and divided by the lessor conveying a part thereof to a third person, or all of it to several grantees, the rent which becomes due under the lease will be apportioned among the several owners. The right of the owner thus to divide his land and to sell it without the consent of the tenant in modern times at least, is absolute.⁷⁶ The apportionment of rents between separate parcels of a land which are leased at an entire rent, when they are separately conveyed, should be determined by their respective value and not by their respective size.⁷⁷ In an English case it has been held that an agreement by which the owner of two houses which are leased at an entire rent in conveying, one of them apportions the rent with the grantee of the house

⁷⁵ Withington v. Nichols, 187 Mass. 575, 73 N. E. Rep. 855.

⁷⁶ Crosby v. Loop, 13 Ill. 625, 627; Anderson v. Robbins, 82 Me. 422, 425, 19 Atl. Rep. 910, 8 L. R. A. 568; Worthington v. Cooke, 56 Md. 51, 54; Emmes v. Feeley, 132 Mass. 346; Newall v. Wright, 3 Mass. 138, 3 Am. Dec. 98; Keay v. Goodwin, 16 Mass. 1; Montague v. Gay, 17 Mass. 439; Cheairs v. Coats, 77 Miss. 846, 850, 28 So. Rep. 728; Boston & Worcester R. R. Corp. v. Ripley, 13 Allen (Mass.) 421; Earle v. Kingsbury, 3 Cush. (Mass.) 206, 209; Biddle v. Hussman, 23 Mo. 597, 598, 602; Farley v. Craig, 11 N. J. Law, 262, 273; Ryerson v. Quackenbush, 26 N. J. Law, 236; Gribble v. Toms, 70 N. J. Law, 522, 57 Atl. Rep. 144,

145; Van Rensselaer's Ex'r v. Gal-lup, 5 Denio (N. Y.) 454; Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135, 141; Nellis v. Lothrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Reed v. Ward, 22 Pa. St. 144, 149; Linton v. Hart, 25 Pa. St. 193, 196, 64 Am. Dec. 691; Salmon v. Mathews, 8 Mee. & Wel. 825; Moodle v. Garnance, 3 Bulst. 153; West v. Lassels, Cro. Eliz. 851; Bliss v. Collins, 5 Barn. & Ald. 876; Rivis v. Watson, 5 M. & W. 255; Ehrman v. Mayer, 57 Md. 612; Church v. Seeley, 110 N. Y. 457; Ards v. Watkins, Cro. Eliz. 637, 651; Campbell's Case, 1 Roll. Abr. 237; Moody v. Garnon, 3 Bulst. 153.

⁷⁷ O'Connor v. O'Connor, 19 W. R. 90.

conveyed but to which the lessee is not a party, is not binding on the lessee inasmuch as he was not a party to it.⁷⁸ Elsewhere it has been held that the consent of the tenant may be dispensed with in making the apportionment, though in no case can the rent as apportioned among the several lessors exceed in amount the sum total of the rent which is mentioned in the original lease.⁷⁹ Hence a reversioner may subdivide his land and sell it in parts to many persons and a tenant of the whole must divide his rent and pay to each grantee his due proportion of the same. So, in case the lessor shall die and his land descend to two or more heirs as tenants in common, the lessee must pay to each heir that proportionate part to which he is entitled as an heir but no more.⁸⁰ This involves no hardship to the tenant for, though each new owner of the reversion may sue him and distrain separately for the portion of the rent due him, the tenant may avoid this by paying his rent promptly. If the tenant cannot agree with the several heirs or reversioners upon the apportionment it may be made by the court or jury according to the values and not according to the size of the several portions. Where rent is apportionable on a sale of a part of the land by the lessor, an action by him need not be limited to the part he owns but he may sue for the whole and he may recover as much as the jury find him entitled to and he will be barred of the residue by the payment.⁸¹

⁷⁸ *Bliss v. Collins*, 5 B. & Ald. 876, 1 D. & R. 291, 24 R. R. 601.

⁷⁹ The eviction of a tenant by a grantee of his landlord from that portion of the premises which has been conveyed by the landlord, does not prevent the landlord from recovering the rent from the tenant for that portion of the premises which the landlord still owns and the tenant still occupies. *Gribble v. Toms* (N. J. Law, 1904), 57 Atl. Rep. 144.

⁸⁰ *Reed v. Ward*, 22 Pa. St. 144, 149; *Bank of Pennsylvania v. Wise*, 3 Watts (Pa.) 404; *Salmon v. Mathews*, 8 M. & W. 827; *Boston & Worcester R. Co. v. Riley*, 12 Allen (Mass.) 421.

⁸¹ "Apportionment, in cases where it is permitted, is for the benefit of the owners of the rent or the reversioners. Ordinarily it is against the interest of tenants, and the omission to apportion is not a matter of which they can complain. If the several owners of a lease are disposed to treat it as an entire contract, the tenant cannot object and insist that it shall be divided into several contracts, unless something has transpired to relieve the tenant from a just liability to pay the whole rent. This general principle is deducible from the cases upon the subject." *People ex rel. Grissler v. Dudley*, 58 N. Y. 323, 333. An

§ 342. **Apportionment among the assignees of the lessee.**

Where a lessee subdivides his term and assigns all of it thus subdivided to two or more assignees as tenants in common, and not as joint tenants, the liability to pay rent will be apportioned among the assignees according to the value of their respective interests. Each assignee must then pay the lessor only so much of the rent reserved by the lease as his share bears to the lessee's whole interest in the premises.⁸² The proportion of the rent which the various assignees must pay is to be determined by the relative values of the shares which each assignee has the right to occupy, as compared with the whole. If there is no proof of the relative value of the various parts of the premises, they will be presumed to be equally valuable and the rent will be apportioned among the assignees according to the quantity of the land each takes.⁸³ The lessor may sue each of the assignees in debt or covenant for his share⁸⁴ of the rent where the assignees take as tenants in common. The landlord need not join all the assignees as defendants. In conclusion it may be said that though rent is payable in money it may be apportioned among the assignees.⁸⁵

among the grantees of the landlord occurs where the service or proceeds of the rent are not an exception to the rule stated in the text by which rent is apportioned of being divided, as when, for example, the tenant is to deliver to the landlord a horse, for the use of the land on the first day of each month. In such case if the landlord shall buy back a portion of the leased premises or shall distribute his reversion among several or let it be distributed by operation of law the rent ceases. While if the tenant shall sell or assign a certain portion to strangers the rent is multiplied to the several assignees of the tenant who are obligated to deliver a horse to the landlord on the first day of each month. Litt. 222, 1 Inst. 149a, b; Gilbert, Rents,

165-167; Talbot's Case, 8 Co. Rep. 102b, 104.

⁸² Babcock v. Scoville, 56 Ill. 461; Daniels v. Richardson, 22 Pick. (Mass.) 565; Pingrey v. Watkins, 15 Vt. 479; Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135, 141, 45 Am. Dec. 451; Astor v. Miller, 2 Paige Ch. (N. Y.) 78.

⁸³ Van Rensselaer's Ex'rs v. Gallup, 5 Denio (N. Y.) 454, 465; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643. See, also, Main v. Davis, 32 Barb. (N. Y.) 461, and St. Louis Public Schools v. Boatmen's Ins. & Trust Co., 5 Mo. App. 91.

⁸⁴ Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135, 45 Am. Dec. 451; Van Rensselaer's Ex'rs v. Gallup, 5 Denio (N. Y.) 454, 464; Mercer v. Dawson, 5 B. & C. 479.

⁸⁵ An entire rent service being

§ 343. **The liability of testamentary trustees for rent.** Trustees to whom a testator has devised his leasehold estates in trust to permit certain persons to enjoy them for life, are liable on the covenants to repair and to pay rent. The beneficiaries of the trust are not liable on the covenants to the lessor unless the will expressly declares that they shall take it subject to payment of the rent and to the performance of covenants to repair by them. And where the testator has left successive life estates in leaseholds, and has devised all the remainder of his personal estate to the trustees for the purposes of his will, it has been conclusively presumed that he intended the trustees to stand in his place so far as any liability for the performance of the covenants in the leases is concerned.⁸⁶

§ 344. **The payment of rent by an under-tenant to the original lessor.** A person who having no interest in a leasehold, pays taxes and rent on the same, cannot recover against the lessee the money paid by him unless the payment was made to protect his own rights, or unless some fraud was practiced upon him by the lessee.⁸⁷ There being neither privity of contract nor of estate between under-tenants and the original lessor, the latter cannot recover rent, nor for use and occupation, from the under-tenants while the first lessee is in possession. But an under-tenant who is in danger of being ousted because of the default of his lessor in the payment of rent or because of a breach of any covenant in the original lease may pay his rent to the original lessor and deduct the amount thus paid by him from what he owes his immediate lessor. Where the original lessor has an immediate right to enter for the default of the intermediate lessee, the sub-lessee need not wait for the rent to be distrained for or even demanded or for a suit to be threatened or begun against him.⁸⁸ An under-tenant who to protect

indivisible is not apportionable among the assignees of the lessee and on an assignment to several each must render the same service. *Van Rensselaer v. Bradley*, 3 Denio (N. Y.) 135, 143.

⁸⁶ *Re Courtier; Coles v. Courtier*, 55 L. T. Rep. (N. S.) 574, 34 Ch. Div. 136; *Baring, In re; Jeune v. Baring*, 62 L. J. Ch. 50; (1893)

1 Ch. 61, 3 R. 37, 67 L. T. 702, 41 W. R. 87.

⁸⁷ *Sire v. Long Acre Square Bldg. Co.*, 50 Misc. Rep. 29, 100 N. Y. Supp. 307.

⁸⁸ *Peck v. Ingersoll*, 7 N. Y. 528, 529; *Lageman v. Kloppenburg*, 2 E. D. Smith (N. Y.) 126; *Kidney v. Rohrback*, 3 N. Y. St. Rep. 574; *Collins v. Whilldin*, 3 Phila. (Pa.)

his own possession or to avoid a distress, pays the rent due by his lessor to the original lessor may plead such payment in an action brought against him by his lessor to recover rent due under the sublease. His payment of the ground rent is no more voluntary where he may be ousted or distrained for the rent due by his lessor than if he had paid it on the demand of a highwayman. So, if the under-tenant is in danger of a distress or an ouster, the fact that he is granted a little time in which to pay does not render his payment voluntary.⁸⁹ He may pay at once. If he pays the head lessor more than he owes his own lessor, the under-tenant may recover from the latter in *assumpsit*.⁹⁰ Such payments by an under-tenant will operate not only as a discharge of the rent which has accrued but also as a discharge *in toto* or *pro tanto* of rent which is accruing,⁹¹ and his lessor cannot thereafter either by distress or otherwise compel him to pay him the rent. The same principles are applicable to the payment of an annuity by the tenant which was granted out of the lands before they were demised to the tenant,⁹² and to the payment of the interest due on a mortgage which was paid by the tenant at the request of the landlord,⁹³ and to the payment of the principal due on a mortgage which was prior to the lease and which the tenant paid to protect his possession.⁹⁴ And the subtenant may interpose the same defense of payment to the original lessor against the assignee of a non-negotiable note which he has given his lessor for the rent as he could against his lessor, though the

102; *Waddilove v. Barnett*, 2 Bing. N. C. 543; *Brook v. Biggs*, 2 Bing. (N. C.) 572.

⁸⁹ *Sapsford v. Fletcher*, 1 T. R. 511; *Dyer v. Bowley*, 2 Bing. 94; *Sapsford v. Fletcher*, 1 T. R. 511; *Carter v. Carter*, 51 Bing. 406, 2 M. & P. 723, 7 L. J. (O. S.) 141, 30 R. R. 677; *Taylor v. Zamira*, 1 Brod. & B. 37, 21 R. R. 569; *Dyer v. Bowley*, 9 Moore, 196, 2 Bing. 94; *Johnson v. Jones*, 1 P. & D. 651, 9 A. & E. 809, 813, 8 L. J. Q. B. 124; *Nash v. Grey*, 2 F. & F. 391.

⁹⁰ *Peck v. Ingersoll*, 7 N. Y. 528, 529; *Taylor v. Zamira*, 1 Brod. &

E. 37, 21 R. R. 569, holding also that the tenant should not plead his payments as a cross demand, but that he should plead them as payments of the rent.

⁹¹ *Carter v. Carter*, 5 Bing. 406, 2 M. & P. 723, 7 L. J. (O. S.) C. P. 141, 30 R. R. 677.

⁹² *Taylor v. Zamira*, 2 Marsh. 220, 6 Taunt. 524, 16 R. R. 668.

⁹³ *Dyer v. Bowley*, 9 Moore, 196, 2 Bing. 94.

⁹⁴ *Johnson v. Jones*, 1 P. & D. 651, 9 A. & E. 809, 813, 8 L. J. Q. B. 124.

note was assigned before it became due.⁹⁵ But a subtenant who agrees to pay his rent to the original lessor cannot, where he is sued by his own lessor, set off a debt due him from his lessor. His duty is to pay the original lessor against whom he could not recoup his lessor's debt and having failed to do so he cannot take advantage of his own wrong.⁹⁶ Where under-lessees hold separate portions of premises at distinct rents, the whole of the premises being held under one original lease at an entire rent, and one of the under-lessees, under threat of a distress by the owner of the reversion in the original lease, pays the whole rent, an action is not maintainable by him to recover from the other under-lessee, as money paid to his use, the proportion of the rent due from him.⁹⁷ In the absence of a special agreement, the rent cannot be apportioned between them.⁹⁸

§ 345. **Payment of rent by note, check or draft.** Under the general rule to constitute payment, there must be the delivery

⁹⁵ *Thompson v. Commercial Guano Co.*, 93 Ga. 282, 20 S. E. Rep. 309.

⁹⁶ *Brett v. Sayle*, 60 Miss. 192.

⁹⁷ *Hunter v. Hunt*, 1 C. B. 300.

⁹⁸ *Graves v. Porter*, 11 Barb. (N. Y.) 592. "In support of this position the defendant relied on the cases of *Sapsford v. Fletcher*, *Taylor v. Zamira* and *Carter v. Carter*. Those cases establish the proposition, that a tenant who has been compelled by a superior landlord or other incumbrances having a title paramount to that of his immediate landlord, to pay sums due for ground rent or other charges, may treat such payment as having been made in satisfaction or part satisfaction of rent due to his immediate landlord, and may plead them as far as they extend in bar of an avowry for rent in arrear. The principles upon which these cases rest is this: The immediate landlord is bound to protect his tenant from all paramount claims; and when there-

fore the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or accruing due. All such payments, if incapable of being treated as actual payments of rent, would certainly give the tenant a right of action against his landlord as for money paid to his use, and so would, in an action of debt for rent, form a legitimate subject of set-off. And though in replevin a general set off cannot be pleaded, yet the courts have given to the tenant the benefit of a set-off as to payments of this description, by holding them to be in fact payments of the rent itself or of part of it." *Graham v. Alsopp*, 3 Ex. 186, 18 L. J. Ex. 85.

of money or of some other valuable thing by the debtor to the creditor with the intention and purpose of extinguishing the debt, and the creditor must accept and receive it for that purpose. If the intention to extinguish the debt be not present in the transaction, there is no payment. Thus, the receipt by a creditor of a promissory note for his debt is not payment unless it is received with that intention, and the effect of such a transaction is merely to suspend the right of action until the note becomes due.⁹⁹ The same rule applies to the acceptance of a check by the creditor even where he gives a receipt for it, and he may thereafter sue on the original debt if the check be not paid.¹ These general principles regulating the law of payment are applicable to the payment of rent by the tenant to his landlord. The taking of a note by the landlord, whether it is that of the tenant or of some third person,² or the acceptance by the tenant of a draft drawn on him by the landlord,³ is not necessarily payment of the rent unless it is in fact so agreed to be by the parties. The same rule applies to the giving of a check for rent by the tenant to his landlord though the landlord has given his receipt in full for the rent when he took the note, draft or check. If it is not paid at maturity, the tenant still owes him the rent, and the landlord still retains the same remedies to recover rent from the tenant by a suit at law, or by distress or lien or otherwise as he would have had if no note, draft or check had been given.⁴ The landlord may, however, elect to

⁹⁹ Putnam v. Lewis, 8 Johns. (N. Y.) 389; Burdick v. Green, 15 Johns. (N. Y.) 247; Raymond v. Merchant, 3 Cow. (N. Y.) 147; Reed v. Van Nostrand, 1 Wend. (N. Y.) 424; Central City Bank v. Dana, 32 Barb. (N. Y.) 296; Meyer v. Huneke, 55 N. Y. 412, reversing 65 Barb. 304.

¹ Olcott v. Rathbone, 5 Wend. (N. Y.) 490; Kobbi v. Underhill, 3 Sand. Ch. (N. Y.) 277; Turner v. Bank of Fox Lake, 3 Keyes (N. Y.) 425, 4 Abb. Dec. (N. Y.) 434; Bradford v. Fox, 38 N. Y. 289; East River Bank v. Kennedy, 9 Bos. (N. Y.) 543; Pratt v. Foote,

9 N. Y. 463, 10 N. Y. 599, reversing 12 Barb. (N. Y.) 209; Sweet v. Titus, 4 Hun (N. Y.) 639, 67 Barb. (N. Y.) 327.

² In re Bowne, 3 Fed. Cases, 1741; Kerper v. Booth, 10 W. N. C. (Pa.) 79; Kendig v. Kendig, 3 Pitts. Rep. (Pa.) 287; Sutliff v. Atwood, 15 Ohio St. 186; Josse v. Schultz, 13 Fed. Cas. 7,551, 1 Cranch C. C. 135; Wolgamot v. Brunner, 4 Har. & McH. (Md.) 89.

³ Arguelles v. Wood, 1 Fed. Cas. 520, 2 Cranch C. C. 579.

⁴ Edwards v. Derrickson, 28 N. J. Law, 39; Holmes v. De Camp, 1 Johns. (N. Y.) 33; Burden v.

proceed either on the tenant's obligation to pay rent or he may sue on the check, note or draft which has been given him. If he subsequently sues upon the covenant of the lease to pay rent, he must surrender the note and he cannot recover on the covenant unless he shall do so.⁵ So, the acceptance by a lessor of a bond for the rent due on a written lease is not necessarily payment. If the bond be not paid the landlord may then bring assumpsit for use and occupation though he has received the bond. He need not sue on the bond. He must, however, deliver the bond up to be cancelled.⁶ But where one of two joint lessees under a parol lease executed his individual bond for the rent to the lessor and it was accepted by the latter, it will operate as payment and extinguish the liabilities of both lessees on the parol lease under the universal rule that a writing under seal will supersede and destroy a parol agreement. The lessor no longer has any remedy under the parol lease which is merged in the bond but he must sue on the bond and the obligor thereon, as soon as he has been compelled to pay the bond, may recover in an action for contribution from his co-tenant under the lease the portion of the rent which the latter would have had to pay under the lease.⁷

Halton, 4 Bing. 454; *In re Bowne*, 12 N. B. R. 529, 1 N. Y. Wkly. Dig. 100.

⁵ *Smith v. Dayton*, 94 Iowa, 102, 12 N. W. Rep. 650.

⁶ *Carnell v. Lamb*, 20 Johns. (N. Y.) 207.

⁷ *Howell v. Webb*, 2 Ark. 360, 364. The giving of a note for rent in arrears by the tenant will not prevent the landlord from distraining thereafter if the note is not paid. *Harris v. Shipway*, Bull N. P. 182. So where the tenant gave the landlord's agent a bill of exchange which the latter indorsed and paid the rent to his principal, crediting it in his accounts as if the tenant had paid the rent, it was held where the landlord subsequently distrained that the question whether this

transaction was a discount of the bill by the agent for the tenant, or an advance of the rent by the agent to the landlord, was for the jury. *Parrot v. Anderson*, 7 Exch. 93; *Griffith v. Chichester*, 7 Exch. 95. So a judgment obtained on a promissory note given by one of three persons as his share of the joint rent, is not a merger of the landlord's cause of action, where he subsequently sues the co-tenants of the person whose note he has taken for the rent. The note under such circumstances is a mere collateral security and not a satisfaction of the debt, and if the maker does not pay it, the landlord can maintain an action against the other tenants jointly liable with him. As it is stated in the text the rule would be dif-

§ 346. Receipts for rent—When conclusive and presumption of payment therefrom. A receipt for money paid which contains within it no terms of contract is mere *prima facie* proof of payment, and its terms may be varied or contradicted by parol evidence.⁸ Thus, it may be proved even by the landlord himself that he did not receive the money stated to have been paid in the receipt either wholly or in part, or, where the receipt states that money was paid, the landlord may show that the rent was paid by a note or a check.⁹ These facts may be shown by parol although the receipt expressly states that it was in full for all the rent to date.¹⁰ In so far, however, as the receipt for rent is a contract of lease, it cannot be varied or contradicted by parol evidence tending to show that a different contract was made by the parties. That is to say, so far as the writing is both a receipt for rent and a lease of the premises, it may be contradicted or explained so far as it recites the payment of rent; but that part of it that is contractual cannot be contradicted or varied by parol evidence, except to show facts, circumstances or defenses which may be shown by parol in the case of other contracts.¹¹ The rule that a receipt may not be varied so far as it is a contract, is of particular value in the case of receipts for rent, owing to an almost universal custom where tenancies are for short periods, as by the month or week, of embodying in the receipts the terms of a contract which, if they were not in the receipt would amount to a lease. A receipt for rent for a particular month or year, is *prima facie* evidence that all rent which has accrued prior to that month

ferent if a bond or instrument under seal had been given. *Drake v. Mitchell*, 3 East, 251.

⁸ *Abrams v. Taylor*, 24 Ill. 102; *Gulick v. Conover*, 15 N. J. Law, 420; *Danziger v. Hoyt*, 46 Hun (N. Y.) 270; *Barclay v. Morrison*, 16 S. & R. (Pa.) 129; *Paige v. Perno*, 10 Vt. 491.

⁹ *Wildrick v. Swain*, 34 N. J. Eq. 167; *Dorman v. Wilson*, 39 N. J. Law, 474; *Johnson v. Weed*, 9 Johns. (N. Y.) 310, 60 Am. Dec. 279; *Buswell v. Pioneer*, 37 N. Y. 312.

¹⁰ *Jones v. Ricketts*, 7 Md. 108; *Gibson v. Hanna*, 12 Mo. 162; *Burnham v. Ayer*, 35 N. H. 351; *Horton's Appeal*, 38 Pa. St. 294; *Smith v. Schulenberg*, 34 Wis. 41.

¹¹ *Wayland v. Moseley*, 5 Ala. 420; *Henry v. Henry*, 11 Ind. 236; *Thompson v. Williams*, 30 Kan. 414. The rules stated in the text are sustained by many cases on contracts generally which it is impracticable to cite in the notes. The cases cited in this note and the preceeding note are not cases of receipts for rent.

or year, has been paid.¹² This presumption, however, of the payment of past rent may be rebutted by parol even where the receipt is in full, by showing that rent prior thereto is still unpaid. The presumption is recognized where the rent is payable to two or more persons to the same extent as where it is payable to one only.¹³ A receipt in full for rent may be shown to have been given under a mistake of fact. Such a receipt given under the mistaken belief that rent was payable at the end of the year is not a bar to an action for rent when it is shown that rent is payable in advance.¹⁴ A receipt in full cancelling a lease may be set aside if procured by fraud. But a receipt will not be set aside, though it amounts to a written surrender of the lease, merely because the lessor, believing it was a receipt only, signed it without reading it, nothing having been done to prevent him from doing so, and no fraud having been practiced upon him.¹⁵ An alteration in the landlord's receipts for rent of the names of tenants does not raise any presumption of a change of tenants or of a transfer of a tenant's right unless made in connection with the knowledge and assent of all parties.¹⁶ In an action of ejectment for the non-payment of rent, if the tenancy is denied and there is no evidence of any receipts for rent or effort to prove any, a subpoena to the tenant to produce receipts with proof of service is not admissible in evidence, as the effect of the recital of such a number of receipts in the notice might have been prejudicial to the defendants where the existence of none of them was actually proven.¹⁷ In the case

¹² *Brewer v. Knapp*, 1 Pick. (Mass.) 332, 336; *Ottens v. Fred Krug Brewing Co.*, 58 Neb. 331, 78 N. W. Rep. 622, 623; *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.) 58; *Decker v. Livingston*, 15 Johns. (N. Y.) 479, 483; *Jenkins v. Calvert*, 3 Cranch C. C. 216, 13 Fed. Cases, 7,263; *Saving Fund v. Marks*, 3 Phila. (Pa.) 278, 15 L. I. 357.

¹³ *Decker v. Livingston*, 15 Johns. (N. Y.) 479, 483.

¹⁴ *Congregational Soc. of Sharon v. Rix* (Vt. 1889), 17 Atl. Rep. 719.

¹⁵ *Jenkins v. Clyde Coal Co.*, 82 Iowa, 618, 622, 48 N. W. Rep. 970. In *Barr v. Chandler*, 47 N. J. Eq. 532, 20 Atl. Rep. 733, a writing as follows. "Received of (the tenant) his right, title and interest in the elevator now placed in our house in consideration of \$200 rent due on the property," was held a sale and not a security for the rent.

¹⁶ *Bourke v. Bourke, Jr.* 8 C. L. 221.

¹⁷ *Jones v. Reilly*, 174 N. Y. 97, 66 N. E. Rep. 649, rvg. 74 N. Y. Supp. 243, 68 App. Div. 116.

of perpetual ground rents the relation of landlord and tenant once having been proved to exist, the mere fact that the landlord has not demanded rent from the occupant raises no presumption that the rent has been paid. In the case of such rents and leases a release of the right to demand or to receive rents must be by deed. If a sealed lease is proved creating a perpetual ground rent, it can only be released by an instrument of equal solemnity. And the laxity or failure of the landlord to demand rent raises no presumption that he has released or extinguished his right to demand it.¹⁸

§ 347. **The application of rental payments.** The application of payments is the appropriation of a payment to some particular debt of two or more or the determination to which of several demands a general payment made by a debtor to his creditor shall be applied. Any general discussion of this topic is obviously out of place in this treatise inasmuch as it properly belongs to the general law of contracts, but the question may often arise between landlord and tenant and in view of this fact it may be well to consider some general principles. It is a general rule of law too well established to be disputed that where a payment is made by a tenant to his landlord, the tenant has a right to prescribe in what manner it shall be applied to the payment of any indebtedness he may owe the landlord.¹⁹ This principle is based upon the fact that the money paid by the tenant is his own money until he pays it and that on parting with the ownership he has the absolute right to annex to its receipt any condition he may desire. Where the tenant owes rent for several rental periods he may apply a payment to any rental period at his election or as between rent and other claims held against him by his landlord, as for example, for goods sold and delivered, the tenant may apply his payment either to the rent or to the other claims. So, the tenant may apply the payment to a debt which is secured by a lien in preference to another debt due the landlord which is not secured by a lien. Where the tenant does not apply the payment made by him the landlord

¹⁸ Ehrman v. Mayer, 57 Md. 612;
Wahl v. Barroll, 8 Gill (Md.) 288;
Campbell v. Shipley, 41 Md. 81;
Worthington v. Lee, 61 Md. 530;

Smith v. Heldman, 93 Md. 343. 48
Atl. Rep. 946.

¹⁹ Collender v. Smith, 20 Misc.
Rep. 612.

may do so.²⁰ But the right of the landlord to apply payments is not unlimited so that he may have the right to apply the payments by his tenant in such a way as to work injustice to the tenant or to a third person. Thus, the landlord cannot apply a payment to rent which is not matured in preference over rent which has matured.²¹ Nor can the landlord apply payments to a claim which he holds against the tenant the validity of which the latter disputes, in preference to a claim for rent which is not contested by the tenant.²² And where the landlord has a claim against the tenant for rent which is liquidated and not disputed and for a breach of covenant under the lease which is disputed, he cannot prefer the latter over the former in applying payments of money by the tenant.²³ Nor can the landlord apply the payment by his tenant to a claim against the tenant based on an immoral or illegal consideration.²⁴ Where there has been no application of payments by either party to the lease, and the tenant owes the landlord rent for several rental periods, the law will apply payments made by the tenant to the landlord to rents which have accrued rather than to those which are not due, and as between rents which have accrued the money will be applied to the extinguishment of rents which have first accrued.²⁵ The appropriation by a landlord of a payment to a particular rental period may be implied by the court from circumstances where there is no express direction by the tenant.²⁶ And payments which were made by the tenant to the landlord to whom the tenant owes not only rent but other unsecured debts in the absence of an application by either party, will be applied by the court to the debts which are unsecured, particularly where the landlord has distrained for the rent.²⁷ The landlord may apply money paid to him as rent

²⁰ *Collender v. Smith*, 20 Misc. Rep. 612.

²¹ *Stamford Bank v. Benedict*, 15 Conn. 437; *Wetherell v. Joy*, 40 Me. 325; *Richardson v. Coddington*, 49 Mich. 1; *Effinger v. Henderson*, 33 Miss. 449; *Cloney v. Richardson*, 34 Mo. 370.

²² *Stone v. Talbot*, 4 Wis. 442.

²³ *Scott v. Fisher*, 4 T. B. Mon. (Ky.) 387.

²⁴ *Greene v. Tyler*, 39 Pa. St. 368.

²⁵ *Hunter v. Osterhoudt*, 11 Barb. (N. Y.) 33; *Reed v. Ward*, 22 Pa. St. 144; *Purdy's Appeal*, 23 Pa. St. 97.

²⁶ *Mitchell v. Dall*, 2 Har. & G. (Md.) 159; *Taylor v. Sandford*, 7 Wheat. (U. S.) 207.

²⁷ *Garrett's Appeal*, 100 Pa. St. 597.

by an assignee of the lease after the assignment to rents which have accrued prior to the assignment, in the absence of an application of the rent by the assignee.²⁸ A landlord to whom a part of the crops of land held by two tenants jointly is paid as rent, cannot, without the consent of both lessees, apply the payment to the individual debt of one leaving the rent unpaid. A tenant who is subsequently thereto sued by the landlord for the rent may have such payment applied to the rent.²⁹

§ 348. **The necessity of a demand for the payment of rent.** The question of a demand by the landlord for the payment of rent arises in two classes of cases. It may arise where the non-payment of rent causes a forfeiture for which the landlord has a right to re-enter upon the premises and in all such cases a demand by the landlord made in accordance with the requirements of the lease at the proper place, and on the day when it is due, cannot be dispensed with.³⁰ The other class of cases is where the question of a demand arises in an action by the landlord upon an express covenant to pay rent or where he sues for use and occupation. Where the landlord sues for use and occupation, in the absence of statute dispensing with a demand, he must allege and prove that a demand has been made for the rent.³¹ If a demand is necessary it must usually be made on the land,³² but, where the place for the payment of the rent is not mentioned in the lease, and it has been the practice of the parties to pay the rent at some other place than on the land, a demand for the payment of the rent on the premises is not necessary.³³ In the absence of statute, a demand for the payment of rent in order to permit the lessor to take advantage of a forfeiture created by a default in the payment of the rent, must be personal, but where the demand for the rent is simply a condition precedent to an action at law, a written demand by mail may suffice, though a

²⁸ *Collender v. Smith*, 20 Misc. Rep. 612, 45 N. Y. Supp. 1130.

²⁹ *Kahler v. Hanson*, 53 Iowa, 398, 6 N. W. Rep. 57.

³⁰ *Godwin v. Harris* (Neb.), 98 N. W. Rep. 439, 440.

³¹ In many of the states a formal demand for the rent on the premises has been dispensed with by

statute. *Cockerline v. Fisher* (Mich.), 103 N. W. Rep. 522; *George A. Fuller Co. v. Manhattan Construction Co.*, 88 N. Y. Supp. 1049.

³² *Fordyce v. Hathorn*, 57 Mo. 120.

³³ *Lund v. Ozanne* (N. Mex.), 84 Pac. Rep. 710.

personal demand is always advisable.³⁴ No demand for the rent by the lessor is necessary to be alleged or proved where rent is payable under a covenant on a particular day, whether it be payable in money³⁵ or in labor or personal property.³⁶ So where a lessee has accepted an order drawn on him by his lessor for the rent a third party may sue thereon without making a prior demand for its payment.³⁷ The parties to the lease may by express stipulation in the lease waive a demand for the payment of the rent.³⁸ Inasmuch as the presentation and collection of rent is merely a ministerial duty it may be delegated to agents having charge of the premises. It follows therefore that a demand by an agent or subagent is equivalent to a demand by the lessor.³⁹ The demand must be made before the action to recover the rent is begun. Any time before service of process is sufficient.⁴⁰

§ 349. The reduction of the rent by the landlord during the term. In order that an agreement to reduce the rent payable under a written lease, made during the term, shall be valid and shall operate as a modification of the lease, it must possess all the requisites of a valid contract. There must be a valid consideration by the tenant for the promise to reduce the rent by

³⁴ *Folsom v. Cook*, 115 Pa. St. 539, 9 Atl. Rep. 93.

³⁵ *Clark v. Charter*, 128 Mass. 483, 484; *McMurphy v. Minot*, 4 N. H. 251; *Burnham v. Dunklee*, 34 N. H. 334; *Remsen v. Conklin*, 18 Johns. (N. Y.) 447; *Collis v. Alburdis*, 9 Civ. Pro. Rep. (N. Y.) 80.

³⁶ *Packer v. Cockayne*, 3 G. Greene (Iowa) 111.

³⁷ *Burnham v. Dunklee*, 34 N. H. 334, 344.

³⁸ *Shanfelter v. Horner*, 81 Md. 621, 32 Atl. Rep. 184, where the lease provided that if the rent fell in arrear for a certain period the tenancy was at once to terminate without further notice. *Lewis v. Hughes*, 12 Colo. 208, 20 Pac. Rep. 621; *Ingalls v. Bissot* (Ind. App.), 57 N. E. Rep. 723; *Pendill v. Union*

Mining Co., 64 Mich. 172, 31 N. W. Rep. 100. No demand is necessary in New York. *Gruhn v. Gudebrod Bros. Co.*, 21 Misc. Rep. 528, 47 N. Y. Supp. 714. See, also, *Martin v. Rector*, 118 N. Y. 476, 23 N. E. Rep. 893, as to necessity of demand in ejectment against the tenant.

³⁹ *Neiner v. Altemeyer*, 68 Mo. App. 243. In *Henderson v. Corbondale Coal & Coke Co.*, 140 U. S. 25, 11 Sup. Ct. 691, which was a proceeding to forfeit a lease for non-payment of rent, a demand by letter, though shown to have been probably received by the tenant, was held insufficient where no reason was proved why personal service of the demand was not made.

⁴⁰ *Stanley v. Turner*, 68 Vt. 315, 35 Atl. Rep. 321.

the landlord, and the agreement must be definite as respects the reduced rent which is to be paid. If the lease is in writing, the agreement to reduce the rent must be in writing, unless the circumstances are such that the court may reasonably infer from the conduct of the parties that a modification in writing was waived by the landlord. It has been held that the amount of rent which is payable under a lease under seal cannot be reduced or increased by parol, and the same rule would doubtless apply in modern times at least to all written leases.⁴¹ A modification or reduction of the rent alone without consideration is not a surrender of the lease, and must be based on an independent consideration.⁴² If, however, the parties orally agree to reduce the rent in a written lease not under seal, and the landlord accepts an installment of the rent at a reduced rate, the reduction is binding on him, and he cannot thereafter allege that the reduction is not binding on him.⁴³ Various promises on the part of the landlord may constitute a good consideration for the reduction of the rent payable by the tenant. Thus if the lessor offers to reduce the amount of the rent which the lessee has to pay, or offers to release the lessee from the payment of an installment of rent which has become due,⁴⁴ or offers to receive payment of the rent in a different mode from that originally stipulated for which may result in a loss to him or a benefit to the tenant,⁴⁵ and in accepting this offer the lessee continues to use and to occupy the land, the modification is based on a good consideration, which on the part of the lessor is the reduction of rent, and on the part of the lessee, the use and possession of the

⁴¹ *Barnett v. Barnes*, 73 Ill. 216, 217; *Hume Bros. v. Taylor*, 63 Ill. 43; *Wharton v. Anderson*, 28 Minn. 301, 9 N. W. Rep. 860; *Smith v. Kerr*, 33 Hun, 567.

⁴² *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120, affirming 7 Hun. 157; *McMaster v. Kohner*, 44 N. Y. Supp. Ct. (12 Jones & S.) 253; *Taylor v. Winters*, 6 Phila. 126, 5 Am. Law Reg. (N. S.) 438, 23 Leg. Int. 125; *Rohrheimer v. Hoffman*, 103 Pa. St. 409; *Crowley v. Vitty*, 7 Ex. 319, 21 L. J. Ex. 135.

⁴³ *Nicoll v. Burke*, 8 Abb. New Cases (N. Y.) 213.

⁴⁴ *Copper v. Fretnaransky*, 16 N. Y. Supp. 866; *Hanson v. Hellen* (Me. 1886), 6 Atl. Rep. 837; *Ten Eyck v. Sleeper*, 65 Minn. 413, 67 N. W. Rep. 1026.

⁴⁵ *Raymond v. Krauskopf*, 87 Iowa, 602, 605, 54 N. W. Rep. 432, where, owing to bad crops on the farm leased, a lessor agreed he would take one-half the crop as rent instead of a fixed quantity agreed upon.

land.⁴⁶ So an agreement by the tenant to remain in the premises after they have been repaired after a fire, is a good consideration for an agreement by the landlord to apportion the rent, and then to remit the rent for the period, during which the premises were uninhabitable.⁴⁷ So, too, an agreement by the tenant to make additions to and alterations in the leased building, which he was not bound to do by the lease, if it is executed by him, is a good consideration for a promise on the part of the landlord to reduce the rent for the balance of the tenant's occupation.⁴⁸ The fact that a tenant, after he has threatened to abandon the premises during the term, continues in possession upon the promise of the landlord to reduce the rent for the balance of the term is not alone a sufficient consideration for the landlord's promise to reduce the rent. The tenant has not agreed to do anything which he was not bound to do under the lease. A different rule applies where the term is at an end. A parol agreement by a landlord at the request of a tenant, under a lease under seal changing the time for the payment of rent from the beginning to the end of the month is valid. The fact that the tenant held over for another term after the expiration of the written lease is a good consideration for the landlord's agreement.⁴⁹ And it has been held that under some circumstances the remaining in possession of a tenant who was about to move may be a good consideration for the landlord's promise to reduce the rent if the lease is in parol. Thus the waiver by a lessee of a right which has accrued to him during the term to sue his lessor for damages for an eviction is a good consideration for a new agreement modifying the lease. So under such circumstances remaining in the house being a detriment to the lessee would be a good consideration.⁵⁰ But in all cases of a modification of the terms of a written lease under seal or otherwise by an oral agreement it must be shown that the latter was wholly executed by the parties to it.⁵¹ For if the reduced rent

⁴⁶ *Evans v. Lincoln Co.*, 204 Pa. St. 448, 54 Atl. Rep. 321.

⁴⁷ *Ireland v. Hyde*, 69 N. Y. Supp. 889. As to what will constitute a new lease by the reduction of rent, see *Watson v. Waud*, 8 Ex. 335, 22 L. J. Ex. 161, 1 W. R. 133.

⁴⁸ *Natelson v. Reich*, 99 N. Y. Supp. 327.

⁴⁹ *Wilgus v. Whitehead*, 89 Pa. St. 131, 134.

⁵⁰ *White v. Walker*, 38 Ill. 422, 435.

⁵¹ *Smith v. Kerr*, 108 N. Y. 31; *McKenzie v. Harrison*, 120 N. Y.

orally stipulated for by the parties is paid, and accepted by the landlord, the agreement reducing the rent is executed, and hence becomes binding on the parties.⁵² And on the other hand, where the tenant fails in the performance of his agreement, either by wholly omitting to pay the reduced rent, or by refusing to pay it in the manner agreed upon, the rights of the landlord under the lease to collect former rent are revived.⁵³ Accordingly where a landlord voluntarily reduced the rent for the first year of the term of a lease for ten years upon the express agreement of the tenant, that the latter would continue in possession as agreed, and carry out the terms of the lease, and the tenant paid two years rent as reduced and subsequently abandoned the premises without the consent of the landlord, the latter may maintain an action against the tenant, to recover the amount of rent which he has remitted.⁵⁴ A reduction of rent based partly upon the fact that the lessees who were merchants were in failing circumstances and on the fact that the lessor who was supplying them with goods had an interest in seeing the lessee succeed is on a sufficient consideration.⁵⁵ The agreement to reduce the rent must be definite and certain both as to amount and time. An agreement on the part of the landlord in consequence of a loss in the value of the premises to reduce the rent without expressly stating the amount to which it was to be reduced, is not enforceable by reason of its uncertainty.⁵⁶ So an agreement by the landlord to reduce the rent, nothing being said by him as to the period during which the reduction was to apply, may be revoked by him at any time on notice to the tenant.⁵⁷

260, 263, 24 N. E. Rep. 458, 8 L. R. A. 257.

⁵² *Bowman v. Wright* (Neb.), 91 N. W. Rep. 580.

⁵³ *Smith v. Hartogg*, 15 Rep. 641.

⁵⁴ *Brown v. Cairns*, 63 Kan. 584, 66 Pac. Rep. 1033.

⁵⁵ *Jaffray v. Greenbaum*, 64 Iowa, 492, 20 N. W. Rep. 775.

⁵⁶ *Smith v. Ankrim*, 13 S. & R. (Pa.) 39.

⁵⁷ *Rohrheimer v. Hofman*, 103 Pa. St. 409. An oral agreement before the expiration of a lease by which a lessee is to take a part-

ner in his business and borrow a large sum of money if the lessor will reduce the rent in a written lease under seal and an actual performance by the lessee of his agreement with his continuance in business for three years under it are a good consideration for the lessor's promise; the latter cannot recover the rent except as it has been reduced. *Hastings v. Lovejoy*, 140 Mass. 261, 2 N. E. Rep. 776, 54 Am. Rep. 772. "It was an old maxim of the common law that an obligor would only be

§ 350. **Increase of rent on re-hiring or during the term.** A parol demand by the landlord for increased rent during the term, and a parol promise to pay by the tenant where the term is created by a written lease, are not enforceable unless there is an actual surrender of the existing term. To permit the covenant to pay rent in a written lease to be varied by a subsequent parol agreement, would violate a cardinal rule of evidence which protects the writings to which parties have committed their intentions from being annulled, contradicted or varied by subsequent agreements in parol. An increase of rent coming at the end of the term is upon a different basis, for if the term under a written lease is surrendered or expires by natural lapse of time, no rule of law prevents the making of a new contract of lease at an increase or at a reduced rental. If the landlord notifies the tenant that his rent is to be increased and the tenant without objection continues to occupy the premises without having expressly refused to pay the increased rent, it will be presumed that he has accepted a new lease at the increased rate of rent which the landlord had notified him he would have to pay.⁵⁸ But, the tenant is not always bound by mere casual remarks made by his landlord in regard to the increased rent. Thus, an oral notice to a tenant from year to year of an increase of rent for a future year does not necessarily make him liable for increased rent by his holding over after having received such notice.⁵⁹

§ 351. **The jurisdiction of the courts in an action to recover rent.** At the common law, the distinction was made in determining the jurisdiction of courts between transitory actions, and those which were not so. At the common law an

released by an instrument of as high dignity as that by which he was bound, being obligated by seal, he could be released only by an instrument under seal. Technically this may be the rule in modern times, but practically, it is not enforced. Of how frequent occurrence is it, that in an action of debt upon a bond or other sealed instrument, the defendant, under a plea of payment, proves by parol the actual receipt by the obligee, of the money due on the

bond and which all courts hold to be a release and discharge of the bond. So with a debt secured by mortgage, a release of such debt need not be under seal." By the court in *White v. Walker*, 38 Ill. 422, 434.

⁵⁸ *Columbia Brewing Co. v. Miller* (Mo. App.), 101 S. W. Rep. 711; *Adrianse v. Hafkemeyer*, 39 Mo. 134; *Hunt v. Bailey*, 39 Mo. 257.

⁵⁹ *Witte v. Witte*, 6 Mo. App. 488.

action on covenant or debt for rent, or for use and occupation being based upon privity of contract between the lessor and lessee is transitory and need not be brought in the jurisdiction where the land is located.⁶⁰ The contrary is the rule when the action is based upon privity of estate *e. g.* where the assignee of the lessee is sued for rent by the lessor.⁶¹ Hence under such circumstances the action against the assignee of the lessee must be brought in the jurisdiction where the land demised is located. Under the modern statutes regulating procedure which have been enacted in the various states of the Union, this distinction no longer exists, and the action against the assignee of the lessee being a personal action, may be brought in any court having jurisdiction of the defendant. Under exceptional circumstances rent may be recovered in equity. Thus, where a written lease is lost, the lessor may proceed in equity and have the lease established as a lost instrument, and then equity, having assumed jurisdiction for this purpose, will proceed to give him judgment for his rent on the covenant of the tenant.⁶²

§ 352. **The form and nature of the lessor's remedy to recover rent.** There are two ways in which a lessee becomes liable to pay rent. One is by his express covenant to pay or by privity of contract. The other way exists in the absence of an express contract when he is liable by implication or by privity of estate. Where he is liable by privity of estate only if he parts with his estate the privity being destroyed, he is no longer liable. Where he is liable by privity of contract as where he has covenanted to pay, he continues liable so long as the contract is not discharged and is liable therefore during the whole term though he has quit possession before the end of the term.⁶³ At common law an action of debt was proper to recover rent for an agreed sum where there was a promise to pay in a sealed or unsealed instrument or by word of mouth.⁶⁴ The action may

⁶⁰ Gray v. Johnson, 14 N. H. 414, 419; King v. Fraser, 6 East. 348; Bulwer's Case, 7 Rep. 1; Davies v. Edwards, 3 Maule & Sel. 380; Kirtland v. Pounsett, 1 Taunt. 570.

⁶¹ Bracket v. Alvord, 5 Cow. (N. Y.) 18; Henwood v. Cheeseman, 3 Serg. & R. (Pa.) 500; University of Vermont v. Joslyn, 21 Vt. 52.

⁶² Lawrence v. Hammett, 3 J. J. Marsh. (Ky.) 287.

⁶³ Whetstone v. McCartney, 32 Mo. App. 430; Jones v. Barnes, 45 Mo. App. 590; Quinette v. Carpenter, 35 Mo. 502.

⁶⁴ Walker's Case, 3 Co. 22a; Howland v. Coffin, 9 Pick. (Mass.) 52, 12 Pick. (Mass.) 125; Pyerson

be maintained against the assignee of the lessee.⁶⁵ If the lease was under seal and contained a covenant to pay rent the proper action was one on this covenant.⁶⁶ Where there was no express promise to pay rent an action on the case or in assumpsit for use and occupation was maintainable to recover the rent upon the theory of an implied promise to pay on the part of the tenant.⁶⁷ The lessor in bringing his action in assumpsit for use and occupation was however liable to be nonsuited by the lessee proving an express demise with a parol or written promise by him to pay rent the nonsuit being based solely upon the fact that the existence of such promise showed that the lessor had mistaken the form of his remedy as he ought to have sued in debt or on covenant.⁶⁸ For at common law an action of assumpsit for use and occupation will not lie in the case of a lease under seal.⁶⁹ To remedy this the statute 11 George II, ch. 19, § 14, was enacted by which this action for use and occupation was recognized, confirmed and extended in its operation so that, by the terms of the statute the landlord could recover notwithstanding proof by the tenant that he had been in possession under an express demise. The statute has been re-enacted in very many of the States.⁷⁰ Hence in more recent times wherever

v. Quackenbush, 26 N. J. L. 236; Trapnall v. Merrick, 21 Ark. 503; Codman v. Jenkins, 14 Mass. 93; Blume v. McClurken, 10 Watts (Pa.) 380; Norton v. Vultee, 1 N. Y. Super. Ct. Rep. 427; McKeon v. Whitney, 3 Denio (N. Y.) 452; Lanning v. Howell, 2 N. J. Law, 256; Allen v. Bryan, 5 B. & C. 512, 4 L. J. (O. S.) 210, 29 R. R. 307; Varley v. Leigh, 2 Ex. 446, 17 L. J. Ex. 289.

⁶⁵ McKeon v. Whitney, 3 Denio (N. Y.) 452.

⁶⁶ Thursby v. Plant, 1 Saund. 237; Ellis v. Rowbotham (1900), 1 Q. B. 740; Cross v. United States, 81 U. S. 479; Kiersted v. O. & A. R. Co., 69 N. Y. 343; Greenleaf v. Allen, 127 Mass. 248; U. P. R. Co. v. C., R. I. & P. R. Co., 164 Ill. 38; Brown v. Cairns, 63 Kan. 693.

⁶⁷ Eppes' Ex'rs v. Cole, 4 H. & M. 168; Dartnal v. Morgan, Cro. Jac. 598; How v. Norton, 1 Lev. 598.

⁶⁸ Wise v. Decker, 30 Fed. Cas. No. 17,906, 1 Cranch, C. C. 171; Oswald v. Godbold, 20 Ala. 811; Gage v. Smith, 14 Me. 466; Codman v. Jenkins, 14 Mass. 93; Smiley v. McLauthlin, 138 Mass. 363; Kiersted v. Orange & A. R. Co., 69 N. Y. 343, 346, 25 Am. Rep. 199.

⁶⁹ Smiley v. McLauthlin, 138 Mass. 363; Kiersted v. Orange & A. R. Co., 69 N. Y. 343, 346, 25 Am. Rep. 199; Codman v. Jenkins, 14 Mass. 93.

⁷⁰ Gosharn v. Stewart, 15 W. Va. 657, 661.

such statutes are to be found an action of assumpsit will lie for rent, though there be an express demise provided it be not by deed.⁷¹ Where parties have mutual dealings, and rent from one of them to the other is part of the account, it may be recovered in an action of account.⁷²

§ 353. **Recovery by the landlord of rent where the tenant has never taken possession.** A tenant who, by no fault or misconduct on the part of the landlord has never taken possession, is liable on his covenant to pay rent as for the breach of an executory contract. If the lessor has not prevented the actual enjoyment of the premises and there is an absolute covenant on the part of the lessee to pay rent, an action on the covenant may be maintained by the landlord although the lessee has never entered upon the premises.⁷³ If the tenant is kept out of possession by the landlord the latter has no action on the covenant of the lessee to pay rent. And the landlord must show where he sues on the covenant for rent and cannot show that the tenant was in possession, that he was ready at all times to give possession, that at the commencement of the term the premises were prepared and ready for occupancy, that at the commencement of the term he either tendered possession or that the tender was either expressly or by conduct waived by the tenant.⁷⁴ The landlord must also show that he has made reasonable efforts to secure another tenant for the premises after his tender of pos-

⁷¹ *Burnham v. Best*, 10 B. Mon. (Ky.) 227, 228; *Patterson v. Stoddard*, 47 Me. 355, 356, 74 Am. Dec. 490; *Swem v. Sharretts*, 48 Md. 408; *Sibley v. Brown*, 4 Pick. (Mass.) 137; *Abeel v. Radcliffe*, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377; *Heidelberg v. Slader*, 1 Handy (Ohio) 456; *Gosharn v. Stewart*, 15 W. Va. 657, 661. *Contra*, *Beecher v. Duffield*, 97 Mich. 423, 56 N. W. Rep. 777. Compare *Burch v. Harrell*, 93 Ga. 719, 721, 20 S. E. Rep. 212.

⁷² *Nedvidek v. Meyer*, 46 Mo. 600. See, also, as to assumpsit for rent, *Gibson v. Kirk*, 1 Q. B. 850, 856; *Osgood v. Dewey*, 13 Johns.

(N. Y.) 240; *Collyer v. Collyer*, 113 N. Y. 442, 448; *Codman v. Jenkins*, 14 Mass. 93; *Kline v. Jacobs*, 68 Pa. St. 57, where the relation of landlord and tenant is proved to exist and a return for the use of the land is implied but no definite amount has been fixed or agreed upon.

⁷³ *Tully v. Dunn*, 42 Ala. 262; *Union Pacific R. Co. v. Chicago, R. I. & P. Ry. Co.*, 164 Ill. 88, 45 N. E. Rep. 488, 495; *McGunnagle v. Thornton*, 10 S. & R. (Pa.) 10, 11.

⁷⁴ *La Farge v. Mansfield*, 31 Barb. (N. Y.) 345, 347.

session was refused by his tenant.⁷⁵ If the landlord secures another tenant before the expiration of the term, the court will allow the tenant whom he is suing for the rent on his covenant, credit for the amount which the landlord has received. In an action for rent based upon a covenant to pay rent where the tenant has not gone into possession the measure of damages is the amount of rent due less any advance payment made unless it is shown that the landlord occupied or derived some benefit from the premises after the tenant informed him that he would not go into possession.⁷⁶

§ 354. **Joinder of cause of action for rent.** The lessor in suing on a covenant to pay rent, whether express or implied, may join therewith any cause of action arising on a breach of contract by his tenant. The lessor may join a cause of action for rent with one based on a breach of covenant against waste,⁷⁷ or with one based on the breach of a covenant by the tenant to repair or to make improvements. The landlord may join an action for rent with an action for a breach of covenant or contract which is not embraced in the lease. Under a statute permitting the joinder of causes of action arising out of contract, a cause of action for rent and one for money paid by mistake, are properly joined.⁷⁸

§ 355. **Recoupment, counterclaim and set off, by a lessee in an action to recover the rent.** It is not every injury by the lessor to the rights of the lessee to the possession and enjoyment of the premises which will bar a recovery of the rent by the lessor. The lessor's conduct which is the basis of the lessee's defense must be such as will have deprived the lessee of the possession of the premises in whole or in part.⁷⁹ In other words in order that the lessee shall be exempted from his liability to the lessor for rent there must have been an eviction wholly or in part depriving the lessee of his possession, or some act on the part of the lessor by which the lessee has lost his possession. The tenant cannot retain possession of the premises and at the same time

⁷⁵ *La Farge v. Mansfield*, 31 Barb. (N. Y.) 345, 349. And see, also, *Sausser v. Steinmetz*, 88 Pa. St. 324, 327; *Harger v. Edwards*, 4 Barb. (N. Y.) 256, 260.

⁷⁶ *Segal v. Ensler*, 16 Misc. Rep. 43, 37 N. Y. Supp. 694.

⁷⁷ *Carter v. George*, 30 Kan. 451, 1 Pac. Rep. 58.

⁷⁸ *Olmstead v. Dauphiny*, 104 Cal. 635, 38 Pac. Rep. 505.

⁷⁹ *News Co. v. Browne*, 103 Ill. 317; *Edgerton v. Page*, 20 N. Y. 284.

repudiate the landlord's claim for the rent which is the consideration for the possession. He must elect whether, in view of the landlord's acts and the consequences of such acts on his possession, he will abandon his possession and claim an eviction or whether he will remain in possession and pay rent.⁸⁰ It does not follow, however, that a lessee by remaining in possession after the lessor has committed an act which would have justified the lessee in abandoning possession is absolutely and universally without remedy. In an action brought by the landlord to recover for a breach of the covenant to pay rent the tenant may usually recover damages for the breach of any covenant contained in the lease and which is binding upon the landlord.⁸¹

⁸⁰ "If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon, and he cannot sustain a plea of eviction by showing that there were circumstances that would have justified him in leaving the premises; hence it has been held there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession and then escape the payment of rent by pleading a state of facts which, though conferring the right to abandon, had been unaccompanied by the exercise of that right." By Magruder, J., in *Keating v. Springer*, 146 Ill. 481, 34 N. E. Rep. 805, 808, 37 Am. St. Rep. 175, 22 L. R. A. 544, citing cases.

⁸¹ *Vandegrift v. Abbott*, 75 Ala. 487; *Hurton v. Miller*, 84 Ala. 537, 4 So. Rep. 370; *Trathen v. Kipp*, 15 Colo. App. 426, 62 Pac. Rep. 962; *Hylan v. Jockey Club Wine, Liquor & Cigar Co.*, 9 Colo. App. 299, 48 Pac. Rep. 671; *Lewis v.*

Chisolm, 68 Ga. 40; *Stewart v. Lanier House*, 75 Ga. 582; *McAles-ter v. Landers*, 70 Cal. 79, 11 Pac. Rep. 505; *Mitchell v. Plaut*, 31 Ill. App. 148; *Harmony Co. v. Rauch*, 62 Ill. App. 97; *Pepper v. Rowley*, 73 Ill. 262; *Watson v. Huntoon*, 4 Ill. App. 294; *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233; *Reno v. Mendenhall*, 58 Ill. App. 87; *Pickens v. Bozell*, 11 Ind. 275; *Block v. Ebner*, 54 Ind. 544, 548; *Smith v. Hall*, 11 Me. 295; *Eddy v. Coffin*, 149 Mass. 463, 21 N. E. Rep. 870; *Holbrook v. Young*, 108 Mass. 83, 86; *Hovey v. Walker*, 90 Mich. 527, 51 N. W. Rep. 678; *Long v. Geriet*, 57 Minn. 278, 280, 59 N. W. Rep. 194; *Goebel v. Hough*, 26 Minn. 252, 255, 2 N. W. Rep. 847; *Bloodwarth v. Stevens*, 51 Miss. 475, 479; *Kiernan v. Germain*, 61 Miss. 498, 503, 504; *Green v. Bell*, 3 Mo. App. 291, 295; *Crawford v. Armstrong*, 58 Mo. App. 214; *Hunter v. Reiley*, 43 N. J. Law, 480; *Nichols v. Dusenbury*, 2 N. Y. 283, 288; *Myers v. Burns*, 33 Barb. (N. Y.) 401; *Kelsey v. Ward*, 16 Abb. Prac. (N. Y.) 98; *Cook v. Soule*, 45 How. Pr. (N. Y.) 340; *City of New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538;

Let us take for example a breach of a covenant by the lessor which consists of an act equivalent to an eviction. The lessee may waive the eviction, continue in possession and plead the wrongful act of the lessor by way of recoupment, or counterclaim as it is termed in some jurisdictions, either as a complete defense or *pro tanto* to the lessor's claim for rent.⁸²

This is the almost universal rule in the United States by statute. And that it is based upon fairness and reason may readily be seen when we consider that, inasmuch as the object of an action for rent is to ascertain how much the lessee ought to pay for his use and enjoyment of the premises, if the lessor by his conduct has impaired the value of such enjoyment the lessee ought not to pay as much as if the lessor had in no wise impaired the enjoyment of the lessee. In an action for rent under a lease providing for its payment monthly in advance, where the defense was that a covenant to supply steam had not been performed, the performance of the covenant was not a condition precedent to the defendant's liability for rent which plaintiff must prove in order to recover.⁸³ The tenant is not bound to recoup the damages which he has received. He may do this at his election or he may bring a separate action against his landlord for any damages which he has received by reason of the breach by the landlord of an independent covenant. The fact that the tenant has

Darwin v. Potter, 5 Denio (N. Y.) 306; Moffat v. Strong, 22 N. Y. Super. Ct. Rep. 57; Ludlow v. McCarthy, 5 App. Div. 517, 38 N. Y. Supp. 1075; Jeffers v. Bantley, 47 Hun (N. Y.) 90; Hirsch v. Olmesdahl, 78 N. Y. Supp. 832; Ely v. Spiero, 51 N. Y. Supp. 124; Lewis v. Culbertson, 11 S. & R. (Pa.) 59; Depuy v. Silver, 1 Clark (Pa.) 288; Philips v. Monges, 4 Whart. (Pa.) 226; Prescott v. Otterstatter, 85 Pa. St. 534; New York & T. Land Co. v. Cruger (Tex.), 27 S. W. Rep. 212.

⁸² Keating v. Springer, 146 Ill. 481, 34 N. E. Rep. 805, 808, 37 Am. St. Rep. 175, 22 L. R. A. 544; Lindley v. Miller, 67 Ill. 244; Lynch v. Baldwin, 69 Ill. 210; Pepper v.

Rowley, 73 Ill. 262; La Farge v. Mansfield, 31 Barb. (N. Y.) 345; Hunter v. Reiley, 43 N. J. Law, 480; Horton v. Miller, 84 Ala. 537, 4 So. Rep. 370; Abrams v. Watson, 59 Ala. 524; Pickens v. Bozell, 11 Ind. 275; Holbrook v. Young, 108 Mass. 83; Crane v. Hardaman, 4 E. D. Smith (N. Y.) 339; City of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538, reversing 9 N. Y. Super. Ct. 401; Shallies v. Wilcox, 4 Thomp. & C. (N. Y.) 591; McKesson v. Mendenhall, 64 N. C. 286; Rogers v. McKenzie, 73 N. Car. 487; Lewis v. Culbertson, 11 S. & R. (Pa.) 59.

⁸³ Trenkman v. Schneider, 56 N. Y. Supp. 770, 26 Misc. (N. Y.) 695.

paid his rent for nearly the entire term will not prevent him from setting up his counterclaim for damages for the entire term.⁸⁴ In an action by the landlord to recover rent the tenant may set off damages sustained by him by reason of the landlord's breach of a covenant to repair,⁸⁵ or by reason of an agreement contained in the lease that the tenant should be remunerated by the landlord for certain work performed during the term.⁸⁶ The tenant cannot recoup damages for trespass not amounting to an eviction, in an action to recover rent. The reason of this is that the right to recoup depends upon the fact that the damages which are to be set off must have arisen from, or sprung out of the contract or transaction upon which the plaintiff sues. An action for rent is either on a covenant or on an implied promise to pay it while a trespass is a tort independent of the engagement to pay rent and having no essential connection with it.⁸⁷ So a cause of action for the conversion by the landlord of the personal property of the tenant left on the premises after the tenant's removal or consisting of fixtures for the removal of which no provision is inserted in the lease cannot be set-off against a claim for rent.⁸⁸ A tenant who alleges that his land-

⁸⁴ *McAlester v. Landers*, 70 Cal. 79, 11 Pac. Rep. 505.

⁸⁵ *Reno v. Mendenhall*, 58 Ill. App. 87; *Jeffers v. Bantley*, 47 Hun, 90.

⁸⁶ *Crawford v. Armstrong*, 58 Mo. App. 214. "According to the earlier practice, such defense could not be made. But it is now well settled that the tenant need not sue in a cross-action, and may set up his damages in extinguishment or reduction of the demand of the landlord in his action. This right of recoupment arises where the cross-demand grows out of the same contract or transaction. Whenever the contract contains mutual stipulations, the defendant may rely upon some breach of the covenant or engagement in his favor, and the damages accrued therefrom, as a total or partial satisfaction of the demand arising

out of another part of the same contract, the subject of plaintiff's suit. * * * Nor is the right at all affected by the fact that the damages are unliquidated." *Bloodworth v. Stevens*, 51 Miss. 475, 479.

⁸⁷ *Bartlett v. Farrington*, 120 Mass. 284; *Willis v. Branch*, 94 N. Car. 142; *Levy v. Bend*, 1 E. D. Smith (N. Y.) 169; *Drake v. Cockroft*, 4 E. D. Smith (N. Y.) 34, 10 How. Pr. (N. Y.) 377, 1 Abb. Prac. (N. Y.) 203; *City of New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Hulme v. Brown*, 3 Heisk (Tenn.) 679. *Contra*, *Johnson v. Aldridge*, 93 Ala. 77, 9 So. Rep. 513.

⁸⁸ *City of New York v. Parker Vein S. S. Co.*, 21 N. Y. Super. Ct. 300; *Ludlow v. McCarthy*, 5 App. Div. 517, 38 N. Y. Supp. 1075.

lord has broken an agreement or covenant in the lease cannot where his landlord has sued for the rent, maintain a suit for specific performance of the covenant and in that action enjoin the collection of the rent. He may and indeed must interpose the breach of the landlord's covenant as a counterclaim and set off his damages sustained thereby against the rent which is due.⁸⁹

§ 356. **Notice to produce the lease in an action to collect rent.** In an action for rent, if either party desires to prove a lease in the possession of the other, he must give the other reasonable notice to produce it before he can give secondary evidence of its contents. Such notice is not necessary where it would be ineffective, as, for example, where the opposite party has sworn positively that he has not the paper, does not know where it is, or has lost it, or otherwise testifies to facts that show that it is not in his possession or under his control. Whether the paper was or was not lost and the sufficiency of the preliminary proof to admit secondary evidence of its contents, is for the court. The degree of diligence to be used in the search depends upon what value is attached to the lease by the party from whose possession it was lost. In the case of a mere agreement for a lease not signed by either party very little care would be expected in preserving it and evidence of slight diligence in searching would be enough to admit secondary evidence of its contents.⁹⁰

§ 357. **Payment of rent during occupation. The meaning of the word "occupy."** The word "occupy" when employed in a lease generally means more than merely an actual use of the premises as a place of residence or a place to store goods. This word in its primary sense means to possess and implies a permanent tenure for a more or less lengthy period. Of course its meaning may vary according to the subject matter in connection with which it is used.⁹¹ Thus a right to live in, inhabit, dwell in and "occupy premises" with appurtenances, for the term of a person's natural life, creates a life estate in the premises in such person.⁹² And a guarantee that a person shall pay another rent so long as the latter shall "occupy" the premises leased to

⁸⁹ *Douglas v. Chesebrough Building Co.*, 67 N. Y. Supp. 755.

⁹⁰ *Union Banking Co. v. Gittings*, 45 Md. 181, 195.

⁹¹ *Regina v. Inhabitants of St. Nicholas*, 5 Barn. & Adol. 227.

⁹² *Rex v. Inhabitants of Eatington*, 4 T. R. 181.

him covers the period included in the lease and not merely the period the lessee is in actual occupation.⁹³ And where a lease provided that at the end of a certain period either party to it might terminate it on giving three months' notice and that, if no notice was given the lease should run on until determined by notice and that the tenant should pay rent "so long as he should occupy" the same, the meaning of the lease is that the tenant shall pay rent for the term of the lease though he may abandon the demised land before the term expires without notice.⁹⁴

§ 357a. **The collection of the rent by an agent.** An agent who collects rent must have been expressly authorized to do so before any receipt given by him for rent received by him is binding upon his principal. The fact that he had been authorized by the landlord to execute a lease as his agent does not confer upon him power to collect and give receipts for rent falling due under the lease which he has executed. This however may be a circumstance which, connected with other facts and circumstances, may raise a presumption in the minds of the jury that a special authority to collect rents has either expressly or by necessary implication been conferred upon him by the landlord.⁹⁵

§ 358. **The appraisal of the rent on the renewal of the lease.** Provisions for the fixing of the rent by an appraisal on the renewal of the lease are customary in leases providing for a renewal. Where the property is located in a city under circumstances which are likely to result in an increased valuation of the premises and the lease is for a long term, as for example, twenty-one years, a provision for re-adjustment of the rent on the termination of the term by a competent appraisal is indispensable as both parties are equally interested in having the rent re-adjusted from time to time on a fair basis. The landlord particularly should provide in granting a lease for a long term with a privilege of a renewal for another long term that the rent shall be re-appraised at the end of each term. Usually, the appraisal is a condition precedent to the renewal of the lease. Both parties should attempt with fairness and equity to each other to carry out the intention of the lease that an appraisal should be had.

⁹³ *Morrow v. Brady*, 12 R. I. 131.

⁹⁴ *Lane v. Nelson*, 31 Atl. Rep. 864, 866, 167 Pa. St. 602.

⁹⁵ *Smith v. Hall*, 19 Ill. App. 17;

Thompson v. Elliott, 73 Ill. 221.

223; *Cooley v. Willard*, 34 Ill. 68;

Heflin v. Campbell, 5 Tex. Civ.

App. 106, 23 S. W. Rep. 595.

Neither party will be permitted to suffer by an unreasonable refusal of the other party to have an appraisal. The subject is peculiarly within the jurisdiction of equity and as is pointed out in the subsequent paragraphs a court of equity will not hesitate to assume control of the matter and deal out justice between the parties.

§ 359. **The manner of the appraisal.** It will be implied though not stated in a stipulation for an appraisal of the rate of rent by two appraisers selected by the parties both of whom are to select a third that only disinterested and impartial persons shall be selected. An award made by appraisers one of whom is intimately connected in business and social relations with one of the parties to the lease will for that reason be set aside by the court.⁹⁶ If this were not the rule it would result in the parties each choosing his own agent as an appraiser and the appraisal or arbitration would then be merely an argument between the parties through the mouths of their agents leaving the real appraisal to be made by the umpire alone. An appraisal of rent according to the value of the premises upon a renewal of a lease must be made according to the mode pointed out in the provision of the lease which requires and permits an appraisal. An appraisal or written determination of rent required by the lease to be made by a specified number of appraisers is invalid if it is made by a smaller number. The power to appraise being of a private and personal nature and expressly delegated to a particular number of persons must be exercised by all of them. Thus if it is provided that an appraisal shall be made by three persons an appraisal signed by two only is invalid.⁹⁷ If however the stipulation is to appraise the rent by two appraisers or arbitrators and in case they cannot agree then they are to call in a third and their award shall be final; it will be implied that the parties had in mind an award by the majority and such an award or appraisal signed by two will be valid.⁹⁸ The parties to the

⁹⁶ *Pool v. Hennessy*, 39 Iowa, 192, 18 Am. Rep. 44.

⁹⁷ *Lowe v. Brown*, 22 Ohio St. 463, 466; *Cope v. Gilbert*, 4 Denio (N. Y.) 347, 348; *Green v. Miller*, 6 Johns. (N. Y.) 39; *Stose v. Heissler*, 120 Ill. 433, 11 N. E. Rep. 161, 60 Am. Rep. 563.

⁹⁸ *Hobson v. McArthur*, 16 Peters (U. S.) 182; *Quay v. Westcott*, 60 Pa. St. 163, 166. All three must act, however, though an award or appraisal signed by two is binding. *Stose v. Heissler*, 120 Ill. 433, 11 N. E. Rep. 161, 60 Am. Rep. 563.

lease have the right to appear before the persons who are chosen by them as appraisers to ascertain the rent. If the appraisers are expressly appointed to ascertain the rent, and the manner in which they are to ascertain it is not prescribed in the lease it may safely and fairly be presumed that they are to do so by a consideration of the facts which the parties shall place before them. The right to produce evidence before those who are to ascertain the rental value may be waived and the ascertainment of the rent may be left to the knowledge and judgment of the appraisers alone. Proof that the parties have waived their rights to produce evidence before the appraisers must be satisfactory to the court. A waiver of this right will not imply a waiver of the right of the parties to appear before the umpire who has been selected by the appraisers when they found it was impossible for them to agree. Hence all parties are entitled to notice of all proceedings before either appraisers or umpire and an award without such notice is invalid.⁹⁹

§ 360. **The result of a failure to fix the rent.** A landlord, who by withdrawing an arbitrator appointed by him prevents the fixing of rent on a renewal lease cannot oust the tenant in summary proceedings for non-payment of rent. A court of equity will intervene and stay such a proceedings by injunction in all cases where the tenant is precluded from interposing an equitable defense in a summary proceedings. The court of equity on a proper application having acquired jurisdiction will also decree a specific performance of the covenant for a new lease and will fix the rent at such a rate as it shall find to be just and proper on all the proof.¹ Or the court may direct that the tenant shall pay rent while holding over at the rate specified in the former lease.² Or the landlord may recover a reasonable sum for use and occupation from a tenant holding over after a failure to arbitrate or appraise the rent.³ A landlord who has done all he is required to do under a stipulation providing that

⁹⁹ Brown v. Lyddy, 11 Hun (N. Y.) 451, 456; Day v. Hammond, 57 N. Y. 479; Worthington v. Hewes, 19 Ohio St. 66. On the other hand, it has been held in one case that inasmuch as an appraisal of rent is not an arbitration, the parties of the lease are not entitled to no-

tice of it. Norton v. Gale, 95 Ill. 533, 35 Am. Rep. 173.

¹ Graham v. James, 30 N. Y. Super. Ct. (7 Rob.) Rep. 468, 473.

² Holsman v. Abrahams, 9 N. Y. Super. Ct. Rep. 435, 437.

³ Stose v. Heissler, 120 Ill. 433, 11 N. E. Rep. 161, 60 Am. Rep. 563.

rent shall be determined by appraisers and who has failed, without fault on his part to secure an appraisal may sue for and recover a reasonable sum for the use and value of the premises. If one attempt to secure an appraisal fails and no further attempts are required to be made by the lease there is neither reason nor justice in refusing to permit him to recover for the use of the premises so long as the tenant continues in possession.⁴ And this being so if the appraisal has failed through no fault of the tenant he will be treated as a tenant holding over after the lease has expired and liable to pay rent only at the rate named in the lease. If this is objectionable to the landlord he must serve notice to quit or apply for a judicial appraisal of the rent for a new term.

§ 361. **The power of the court to make or to review an appraisal of rent.** In a proper case a court of equity will review and correct an appraisal of the rent to be paid which is alleged to be based upon the value of the premises as determined by the appraisers.⁵ So, if through no fault of the tenant an appraisal has not been made, a court of equity will, on his application, make an appraisal of the rent based upon the value of the premises.⁶ So, if after an ineffectual attempt at an appraisal one of the parties refuses to proceed any further in an attempt to secure another appraisal, the court may itself appraise the rent and appoint a referee or master to do it. The party who is asking for the appraisal by the court must show that he has done all that could be reasonably required of him for if one party refuses to comply with the terms of the lease requiring an appraisal the other party should not be prevented from having the benefit of the appraisal.⁷ And while the court will make the appraisal itself it will not compel appraisers to act or decree a specific performance of an agreement to name persons to appraise rent,⁸ and the court will not appraise the rental value before the time when, according to the terms of the lease, it was to be determined by an appraisal. And in all

⁴ Heissler v. Stose, 131 Ill. 393, 396, 23 N. E. Rep. 347, affirming 23 Ill. App. 39; Stose v. Heissler, 120 Ill. 433.

⁵ Texas & P. R. Co. v. Society for Relief of Orphans, 56 Fed. Rep. 753.

⁶ Tobey Furniture Co. v. Rowe, 18 Ill. App. 293; Piggot v. Mason, 1 Paige (N. Y.) 412.

⁷ Lowe v. Brown, 22 Ohio, 463, 467.

⁸ Young v. Wrightson, 11 Ohio Dec. 104.

cases the parties will have a reasonable time to secure the appraisal of the rent unless time is expressly made of the essence of the contract.⁹ An award or an appraisal of the rent which is to be paid in the future will be presumed to have been honestly and fairly made in the absence of proof of fraud. The proof of fraud which will be sufficient to set aside an appraisal must be fairly convincing. The appraisal ought not to be set aside if it has been honestly made merely because the appraisers have erred in their inferences from the proof before them, in their misunderstanding or ignorance of the law, or in proceeding upon an erroneous theory of the value of the land. To permit an award or appraisal to be set aside which was not conformable to what the court might have determined had it been the arbitrator would render appraisals and arbitrations not only useless but vexatious in the extreme and open also the door for litigation without end. For a material mistake particularly if it be mutual the court will set aside an award or an appraisal but not for every mistake influencing the result of the appraisal. The mistake must be such a mistake as has prevented the appraisers from applying those rules and theories to the appraisal which they intended to employ. Their mistake must be such a one as prevented them from making an appraisal which was the result of the exercise of their own reason and judgment. The mere adoption of an erroneous theory of the value of the property, if properly applied to the facts, though resulting in an erroneous result does not invalidate an award which was honestly made for this is a risk the parties take when they agree to an appraisal and which they must therefore abide by.¹⁰ A clause stipulating

⁹ *Spann v. Eagle Machine Works*, 87 Ind. 474.

¹⁰ *Goddard v. King*, 40 Minn. 164, 167, 41 N. W. Rep. 659; *Daniels v. Willis*, 7 Minn. 295; *Fredrikan v. M. L. Ins. Co.*, 62 N. Y. 392, 400; *Perkins v. Giles*, 50 N. Y. 228; *Tyler v. Dyer*, 13 Me. 41; *Hazeltine v. Smith*, 3 Vt. 535; *Elliott v. Coffin*, 106 Mass. 365; *Carter v. Carter*, 109 Mass. 306; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131. In a very late case (*Grosvenor v. Flint*, 20 R. I.

31, 37 Atl. Rep. 304) the court said:

"This case presents two questions for decision: (1) Whether the court, by a master or otherwise, can appraise the rent payable to the complainants if the arbitration provided for in the lease has failed; and (2) Whether, as a matter of fact, the arbitration has failed. In answer to the first question, we think it is clear that the court has jurisdiction to do, either directly or by its master, what the appraisors or arbitrators

for an arbitration of disputes arising between the parties to the lease and providing that an award which is the outcome of an arbitration shall be final does not limit the right of action to the amount which may be found due or in any way make the right to sue for damages, conditional or dependent upon a submission or an offer to submit to arbitration. A failure to arbitrate a dispute is no bar to an action for damages upon other covenants in the lease.¹¹

§ 362. **The basis of the action for use and occupiaion.** The action for the use and occupation of the premises is based on an implied contract. It is based upon privity of contract not on privity of estate and the plaintiff must therefore prove a contract express or implied to pay either an agreed compensation for the use of the land or such sum as the use is reasonably worth. The action for use and occupation cannot therefore be maintained unless it appears that the relation of landlord and tenant existed between the parties. And when one person occupies land of another without any agreement, and it is not shown that the occupant is a trespasser, or that the relation of landlord and tenant does not exist, it will be presumed that he is in occupation as a tenant.¹² An action for use and occupation can-

could have done under said provision of the lease, if it is shown that the arbitration has in fact failed. And refusal to agree to a third man constitutes such failure. *Brock v. Dwelling House Insurance Co.*, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. Rep. 562; *Niagara Fire Insurance Co. v. Bishop*, 154 Ill. 9, 39 N. E. Rep. 1102, 45 Am. St. Rep. 105; *Brown v. Harper*, 54 Iowa, 546, 6 N. W. Rep. 747; *Watson v. Duke of Northumberland*, 11 Ves. Jr. 153. The covenant to appraise the rent does not stand alone, but is merely a subsidiary part of the lease in question. That is to say, the manner of determining the amount of rent to be paid is a matter of form rather than of substance. And if it appears that this question can-

not be determined in the manner provided for in the lease, by reason of the refusal of one party to the contract to do what in equity it ought to do, the court will determine it upon the application of the other.

¹¹ *Rowe v. Williams*, 97 Mass. 163, 165; *Dunsdaie v. Robertson*, 2 Jones & Lat. 58; *Scott v. Liverpool*, 3 De Gex & J. 334; *Elliott v. Royal Exch. Insurance Co.*, L. R. 2 Exch. 237; *Tobey v. County of Bristol*, 3 Story (U. S.) 819; *Nute v. Hamilton Ins. Co.*, 6 Gray (Mass.) 182; *Gray v. Wilson*, 4 Watts (Pa.) 39; *Hill v. Moore*, 40 Me. 515.

¹² *Byrd v. Chase*, 10 Ark. 802; *Murphy v. Hopercraft*, 142 Cal. 43, 75 Pac. Rep. 567; *Littleton v. Wynn*, 31 Ga. 583; *Lathrop v.*

not be maintained by the agent of the owner suing in his own name,¹³ unless the occupant has dealt with him as the owner of the premises and the identity of the real owner has not been disclosed to the occupant.¹⁴ The owner of land who has agreed to lease iron ore in the land for a term at a certain rent may where no lease is executed maintain an action for use and occu-

Standard Oil Co., 83 Ga. 307, 9 S. E. Rep. 1041; Oakes v. Oakes, 16 Ill. 106; Webb v. Weaver, 79 Ill. App. 657; Curtis v. Hollenbeck, 92 Ill. App. 34; Hill v. Coal Valley Co., 103 Ill. App. 41; Nance v. Alexander, 49 Ind. 516; Cambridge Lodge, etc. v. Routh, 163 Ind. 1, 71 N. E. Rep. 148, 150; Tinder v. Davis, 88 Ind. 99, 101; Kieth v. Paulk, 55 Iowa, 260, 7 N. W. Rep. 588; Fanning v. Stimpson, 13 Iowa, 42; Crouch v. Briles, 7 J. J. Marsh. (Ky.) 255, 23 Am. Dec. 404; Burdin v. Ordway, 88 Me. 375, 34 Atl. Rep. 375; Illinois Cent. R. Co. v. Ross, 26 Ky. Law R. 1251, 83 N. E. Rep. 635; Appleton v. O'Donnell, 173 Mass. 398, 53 N. E. Rep. 882; Carver v. Palmer, 33 Mich. 342, 344; Boston v. Binney, 11 Pick. (Mass.) 1, 22 Am. Dec. 353; Cass Co. Sup'rs v. Cowgill, 97 Mich. 448, 450, 56 N. W. Rep. 849; Strickland v. Hudson, 55 Miss. 235, 241; Knox v. Bailly, 4 Mo. App. 581; Cohen v. Kyler, 27 Mo. 122; Edmondson v. Kite, 43 Mo. 176; Aull Savings Bank v. Aull, 80 Mo. 199; McLaughlin v. Dunn, 45 Mo. App. 645; Rosenberg v. Sprechie (Neb. 1905), 103 N. W. Rep. 1045; Janouch v. Pence (Neb. 1903), 93 N. W. Rep. 217; Skinner v. Skinner, 38 Neb. 756, 57 N. W. Rep. 534; Durrell v. Emery, 64 N. H. 223, 9 Atl. Rep. 97; Dixon v. Ahern, 19 Neb. 422, 14 Pac. Rep. 598; Sweesey v. Durnall, 23 Neb. 531, 37 N. W. Rep.

523; Welcome v. Labonte, 63 N. H. 124; Pendergast v. Young, 21 N. H. 234, 235; Chambers v. Ross, 25 N. J. Law, 293; Collyer v. Collyer, 113 N. Y. 442, 21 N. E. Rep. 114; Lynch v. Onondaga Salt Co., 64 Barb. (N. Y.) 558; Ettlinger v. Degnon-McLean Cons. Co., 42 Misc. Rep. 215, 216, 85 N. Y. Supp. 394; Biglow v. Biglow, 75 App. Div. 98, 100, 77 N. Y. Supp. 716; Lamb v. Lamb, 146 N. Y. 317; Van Arsdale v. Buck, 81 N. Y. Supp. 1017; Isaac v. Minkofsky, 29 Misc. Rep. 347, 60 N. Y. Supp. 506; Preston v. Hawley, 130 N. Y. 296, 34 N. E. Rep. 906; Mitchell v. Pendleton, 21 Ohio St. 664; Heidebach v. Slader, 1 Handy (Ohio) 456; Pott v. Leshner, 1 Yeates (Pa.) 576; Brolasky v. Ferguson, 48 Pa. St. 434, 22 L. I. 28; McClosky v. Miller, 72 Pa. St. 151, 20 Pitts. L. J. 163; Henwood v. Cheeseman, 3 S. & R. (Pa.) 500; Bressler's Appeal, 2 York (Pa.) 57; Seitzinger v. Alspach, 42 L. I. 68; Blake v. Preston, 67 Vt. 613, 32 Atl. Rep. 491; Lazarus v. Phelps, 152 U. S. 81, 14 S. Ct. 477; Adsit v. Kaufman, 121 Fed. Rep. 355; Cobb v. Kidd, 8 Fed. Rep. 695, 696; Carpenter v. United States, 17 Wall. (U. S.) 489, 495.

¹³ Evans v. Evans, 3 A. & E. 132, 137, 1 H. & W. 239.

¹⁴ Fisher v. Marsh, 6 B. & S. 411, 34 L. J. Q. B. 177, 11 Jur. (N. S.) 795, 12 L. T. 604, 13 W. R. 834.

pation against the person who has entered and occupied the land. For the agreement is meant to create more than a mere license and an occupant under it is a tenant at will.¹⁵ A lessee who demises the land to another by parol at a weekly rental for the whole term created by a written lease may maintain use and occupation. Here the parties evidently meant that this transaction should constitute a sublease and not merely an assignment of the term. This construction is fortified by the consideration that if this be regarded as an assignment of a term it will be invalid as not having been in writing.¹⁶ One who pending an executory contract for a lease takes the attornments of undertenants in possession and receives rent from them places himself in the place of the original lessor. The occupation of the undertenants is his occupation and his receipts of rent from them is satisfactory proof of his occupation of the whole premises in an action for use and occupation against him by the original landlord.¹⁷ So where several persons rent premises to be used as a synagogue in which seats are rented the proceeds of which are applied in part to the payment of rent and in part for general religious purposes the lessees may maintain an action for use and occupation against one who occupies a seat.¹⁸ A tenant whose term has expired may thereafter maintain use and occupation against his undertenant for such period as the latter holds over after the expiration of the term provided he himself pays his rent for that period to his own landlord.¹⁹ One to whom a landlord has granted annuities payable out of the rents and profits of the land may maintain an action for use and occupation against a tenant who was in possession at the time the annuity was granted for all rents for the period from the date the tenant was notified of the annuity down to the date he was ousted for nonpayment of rent.²⁰ Only one who has the legal title to the land can maintain an action for use and occupation.²¹

¹⁵ *Jones v. Reynolds*, 4 A. & E. 805, 6 N. & M. 441.

¹⁶ *Pollock v. Stacy*, 9 Q. B. 1033, 1035, 16 L. J. Q. B. 132, 11 Jur. 267.

¹⁷ *Neale v. Swind or Sweeney*, 2 C. & J. 377, 4 Tyr. 464, 1 L. J. Ex. 118.

¹⁸ *Israel v. Simmons*, 2 Stark 356.

¹⁹ *Levi v. Lewis*, 6 C. B. (N. S.) 766, 28 L. J. C. P. 304, 5 Jur. (N. S.) 1048, affirmed in 9 C. B. (N. S.) 872, 30 L. J. C. P. 141, 7 Jur. (N. S.) 759, 9 W. R. 388.

²⁰ *Birch v. Wright*, 1 T. R. 378, 384, 1 R. R. 223.

²¹ *Grady v. Ibach*, 94 Ala. 152, 155, 10 So. Rep. 287.

The beneficiary under a trust cannot maintain such an action²² nor can a mortgagee not in possession maintain it.²³ A grantee of the reversion may maintain an action against the tenant of his grantor.²⁴ He may recover for the subsequent occupation where the tenant with notice of the conveyance paid over the rent to the prior landlord.²⁵ It has been held that where a town or city appropriates land for public use or takes land by mistake believing it to be its own the owner can recover in an action for use and occupation.²⁶ So the owner can recover for use and occupation against an assignee of the lessee,²⁷ but an action for use and occupation cannot be maintained where one who is in the relation of child to the owner occupies the land. There is no implication of any contract to pay rent where the relationship between the owner and the occupant is that of parent and child. The relationship of father-in-law and son-in-law or of uncle and niece does not rebut the presumption of a contract to pay rent.²⁸

§ 363. **The title of the landlord.** The plaintiff in an action for the value of the use and occupation of premises need neither allee nor prove a valid title in himself. He must allege that he is the owner and the occupant having received the benefit of the premises is thereafter estopped to deny the landlord's title.²⁹ The validity of the landlord's title cannot be denied. The occupant cannot escape paying the claim of the owner where he has used the premises by the defense that the owner's title is not good.³⁰ Nor can the conveyance under which the owner held be

²² Grady v. Ibach, 94 Ala. 152, 155, 10 So. Rep. 287.

²³ Turner v. Cameron's, etc., Ry., 5 Ex. 932, 20 L. J. Ex. 71.

²⁴ Birch v. Wright, 1 T. R. 378, 1 R. R. 228; Lumley v. Hodgson, 16 East, 99, 14 R. R. 315; Rennie v. Robinson, 7 Moore, 539, 1 Bing. 147, 1 L. J. (O. S.) C. P. 30, 25 R. R. 604.

²⁵ Lumley v. Hudson, 16 East, 99, 14 R. R. 315.

²⁶ Beardsley v. Town of Nashville, 64 Ark. 240, 41 S. W. Rep. 853; McCardell v. Miller, 22 R. I. 96, 46 Atl. Rep. 184.

²⁷ Weaver v. Southern Oregon Co., 31 Oreg. 14, 48 Pac. Rep. 167.

²⁸ Thompson's Estate, 1 Kulp (Pa.) 235; Sterrett v. Wright, 27 Pa. St. 259.

²⁹ Lewis v. Willis, 1 Wils. 314; Curtis v. Spitty, 1 Bing. (N. C.) 17; Hull v. Vaughan, 6 Price, 157.

³⁰ Sampson v. Schaeffer, 3 Cal. 196; Broughton v. Smart, 59 Ill. 440; Codman v. Jenkins, 14 Mass. 93; Hill v. Boutell, 3 N. H. 502; North Haverhill Water Co. v. Metcalf, 63 N. H. 427; Carpenter v. Stillwell, 3 Abb. Prac. Rep. (N. Y.) 459; Blumberg v. McNear, 1 Wash.

impeached upon the ground that it was made for the purpose of defrauding the creditors of the grantor.³¹

§ 364. **Occupation must be proved.** The landlord must in an action for use and occupation usually show an actual occupation of the premises. This has been so determined under the English statute which entitles the landlord to recover a reasonable satisfaction for the use and occupation of premises which have been occupied or held under a demise. The remedy given by the statute is not identical with an action on a covenant to pay rent. Hence the action given by the statute depends either on an actual occupation or on an occupation which the tenant might have had if he had not voluntarily abandoned the premises.³² Both at the common law and under the English and American statutes in an action for use and occupation it is not necessary to allege or to prove that the defendant has been or is in the manual occupation of the premises, for which a recovery is sought. It is sufficient to show that the landlord has actually conferred the power to occupy and enjoy.³³ Sending a woman to clean a

T. 141; *Vernam v. Smith*, 15 N. Y. 327, 329; *Cooke v. Loxley*, 5 T. R. 4; *Phipps v. Scholorpe*, 1 B. & Al. 50; *Fleming v. Gooding*, 10 Bing. 549; *Dolby v. Hles*, 11 Ad. & El. 335.

³¹ *Balch v. Patten*, 45 Me. 41, 71 Am. Dec. 526.

³² *Naish v. Tatlock*, 2 H. Black. 319, 320, 3 R. R. 384, 388; *Whitehead v. Clifford*, 5 Taunt. 518; *Richardson v. Hall*, 1 B. & B. 50, 3 Moore, 307; *Nation v. Tozer*, 1 C. M. & R. 172, 4 Tyr. 561; *How v. Kennett*, 3 Ad. & E. 659, 5 N. & M. 1; *Town of D'Henrick*, 13 C. B. 892, 1 C. L. R. 335, 17 Jur. 1102; *Standen v. Christmas*, 10 Q. B. 135, 16 L. J. Q. B. 265, 11 Jur. 694; *Lowe v. Ross*, 5 Ex. 553, 555, 19 L. J. Ex. 318; *Edge v. Strafford*, 1 C. & J. 391; *Dawes v. Dowling*, 31 L. T. 65, 22 W. R. 770. *Contra*, *Pinero v. Judson*, 3 M. & P. 497, 6 Bing. 206, 8 L. J. (O. S.) C. P. 19, 31 R. R. 388; *Clarke v.*

Webb, 1 C. M. & R. 29, 4 Tyr. 673, 3 L. J. Ex. 300; *Woolley v. Natling*, 7 Carr. & P. 610; *How v. Kennett*, 3 A. & E. 659, 667, 5 N. & M. 1, 1 H. & W. 391, 4 L. J. K. B. 220. A tenant who agrees to take furnished rooms, but who does not enter, is not liable for use and occupation. *Edge v. Strafford*, 1 C. & J. 391, 1 Tyr. 293, 9 L. J. (O. S.) Ex. 101.

³³ *Little v. Martin*, 3 Wend. (N. Y.) 219; *Featherstonhaugh v. Bradshaw*, 1 Wend. (N. Y.) 134; *Westlake v. De Graw*, 25 Wend. (N. Y.) 669; *Hall v. Western Trans. Co.*, 34 N. Y. 284, 285; *Sherwood v. Gardner*, 2 City Ct. Rep. (N. Y.) 64; *Smith v. Genet*, 2 City Ct. Rep. (N. Y.) 88; *Jones v. Reynolds*, 7 Car. & P. 325; *Woolley v. Watling*, 1 Car. & P. 610; *Gibson v. Carmthorpe*, 1 Dowl. & Ry. 205; *Baker v. Holtzapffel*, 4 Taunt. 45; *Izon v. Gutne*, 5 Bing. 501; *Pinero v. Judson*, 6 Bing. 206;

house rented and workmen to paper the rooms,³⁴ or the putting up of a to-let sign by one who has agreed to become a tenant from a certain date is sufficient occupation to sustain an action.³⁵ An occupation by an undertenant or by a person whom the defendant permits to remain in the premises as a care taker will support an action for use and occupation against the original tenant.³⁶ The accidental retention of the key of the premises by a tenant who has quitted possession and removed his goods is no evidence of occupation which will render the tenant liable in an action for the reasonable value of the use and occupation of the premises.³⁷ An action for use and occupation may be maintained against two or more persons who have become jointly liable to a landlord on parol demise though the occupation is by one of them only.³⁸ A tenant who enters on the possession of premises at a yearly rent with an agreement that no rent is to be paid until the premises are repaired and who quits possession because the premises are not repaired is liable for use and occupation.³⁹ Where land is leased by an instrument not under seal for mining purposes an action for use and occupation may be maintained if the defendant has ever taken

Waring v. King, 8 M. & W. 571;
Smith v. Faust, 2 Man. & G. 841.

³⁴ Smith v. Faust, 2 Man. & G.
841, 3 Scott, 172.

³⁵ Sullivan v. Jones, 3 Car. & P.
579.

³⁶ Bull v. Sibbs, 8 T. R. 327;
Waring v. King, 8 M. & W. 571, 11
L. J. Ex. 49; Ibbs v. Richardson,
1 P. & D. 618, 9 A. & E. 849, 8 L.
J. Q. B. 126, 3 Jur. 102.

³⁷ Gray v. Bompas, 11 C. B. (N.
S.) 520, 5 L. T. 841.

³⁸ Glen v. Dungey, 4 Ex. 61, 64,
18 L. J. Eq. 359; Christy v. Tan-
cred, 7 M. & W. 127, 10 L. J. Ex.
228, 4 Jur. 1064; Christy v. Tan-
cred, 9 M. & W. 438, 11 L. J. Ex.
109.

³⁹ Smith v. Eldridge, 15 C. B.
236, 2 C. L. R. 855. "The truth is
that the occupation of land by a
person bound to pay some remuneration for it, without the amount

or time of payment being fixed,
was and is now of rare occurrence.
When it does occur the implied
contract is raised by law from the
fact that land belonging to the
plaintiff has been occupied by the
defendant by the plaintiff's per-
mission, the obligation is co-ex-
tensive with and measured by the
enjoyment. As soon as the occu-
pation ceases, the implied contract
ceases, and, as no express time is
limited, the remuneration must
necessarily accrue from day to
day. This state of things is *prima*
facie supposed to exist in all ac-
tions for use and occupation, at
least so far as regards time of pay-
ment." By Lord Denman, C. J.,
in Gibson v. Kirk, 2 G. & D. 252,
on p. 255.

possession; and if he has taken possession, he is liable for all subsequent rent until the determination of the tenancy, whether he has continued to work for minerals or not; but if the defendant merely caused holes to be dug on the land, and had them immediately filled up merely to ascertain if there were any ore in the land this would not be a taking of possession.⁴⁰ The payment of rent by an occupant of premises or the suffering of a distress for rent due by him is a sufficient recognition of the title of the landlord and of the relation of landlord and tenant to support an action for use and occupation. This is the rule though the occupant who pays the rent came into possession under the grantor of him to whom he pays rent.⁴¹

§ 365. **Against whom action for use and occupation can be maintained.** The action may be maintained against any one who stands in the relation of tenant to the owner. He may maintain the action against an occupant who continues in possession after he has been told that he will have to pay rent,⁴² though he refuses to pay,⁴³ against a person who encloses a portion of the land with his own land,⁴⁴ against a person who, having a mortgage on a stock of goods in a leased store, takes possession of it and sells the same at retail,⁴⁵ or against a tenant at sufferance.⁴⁶ The action may be maintained against a person who purchases the stock of a prior tenant and who enters and offers to pay rent though the prior term has not been surrendered by the tenant.⁴⁷ A corporation which has occupied and used land for corporate purposes may be sued for use and occupation though there be no lease under seal,⁴⁸ but only the value of the actual occupation can be recovered.⁴⁹ A corpora-

⁴⁰ *Jones v. Reynolds*, 7 Car. & P. 335.

⁴¹ *Panton v. Jones*, 3 Camp. 372, 14 R. R. 757; *Dolby v. Hles*, 11 A. & E. 335, 3 P. & D. 287, 9 L. J. Q. B. 51, 4 Jur. 432.

⁴² *Ill. Cent. R. R. Co. v. Thompson*, 161 Ill. 159, 162, 5 N. E. Rep. 117; *Griffin v. Knisely*, 75 Ill. 411; *Higgins v. Halligan*, 46 Ill. 173.

⁴³ *Gillespie v. Hendren* (Mo. App.), 73 S. W. Rep. 361.

⁴⁴ *Abbey v. Shiner*, 5 Tex. Civ. App. 287, 24 S. W. Rep. 91.

⁴⁵ *Hatch v. Van Dervoort*, 54 N. J. 511, 34 Atl. Rep. 938.

⁴⁶ *Williams v. Ladew*, 171 Pa. St. 369, 33 Atl. Rep. 329.

⁴⁷ *Phipps v. Sculthorpe*, 1 B. & Ald. 50, 18 R. R. 426. See, also, *Hyde v. Moakes*, 5 Car. & P. 42.

⁴⁸ *Lowe v. L. & N. W. Ry.*, 18 Q. B. 632, 21 L. J. Q. B. 361, 17 Jur. 375.

⁴⁹ *Finley v. Bristol & Ex. Ry.*, 17 Ex. 409, 7 Parl. Case, 449, 21 L. J. Ex. 117.

tion may sue for use and occupation persons who have occupied its land as tenants.⁵⁰ An entry by one of two executors of a tenant for years is not the entry of both so as to make them both liable as individuals in an action for use and occupation.⁵¹ The executor who enters is liable personally for use and occupation and not as representing his estate.⁵² An action cannot be maintained against one who holds lands adversely,⁵³ nor by a vendor against a vendee where the contract of sale is rescinded,⁵⁴ nor, against one who by mistake encloses land which is not his own and grazes his stock upon it though on premises of the owner.⁵⁵ So, also, a person whom the lessee takes into his house as a housekeeper⁵⁶ or who lives with the lessee and shares the expense of the family,⁵⁷ or who occupies a store jointly under a contract which does not make him a partner of the lessee,⁵⁸ is not liable to the lessor for the use and occupation of the premises. And in any case where the occupant proves that he expressly repudiated any tenancy, an action will not be maintained.⁵⁹ An assignee in bankruptcy is not liable for use and occupation in a case where the bankrupt was the tenant of a store unless the assignee in bankruptcy actually takes the lease as assignee and enters into possession under the lease. In such case where the assignee in bankruptcy finds a lease and a stock of goods in leased premises among the assets coming into his possession and he enters the store, it is a question for the jury whether he enters the premises as a tenant or merely for the purpose of removing and selling the goods. Upon this question the acts and statements of the assignee and the length of

⁵⁰ *Stafford Corporation v. Til*, 4 Bing. 75, 12 Moore, 260, 5 L. J. Q. B. 77, 29 R. R. 511.

⁵¹ *Nation v. Tozer*, 1 C. M. & R. 172, 4 Tyr. 561, 3 L. J. Ex. 234.

⁵² *Nixon v. Quinn, Jr.* 2 C. L. 247.

⁵³ *Allen v. Macon, D. & S. R. Co.* (Ga.), 33 S. E. Rep. 696; *Emery v. Emery*, 87 Me. 281, 32 Atl. Rep. 900; *Roxbury v. Huston*, 39 Me. 312; *Goddard v. Hall*, 55 Me. 579; *Boston v. Binney*, 11 Pick. (Mass.) 1, 9, 22 Am. Dec. 353; *Swift v. New Durham Lumber Co.*, 64 N.

H. 53, 5 Atl. Rep. 903; *Biglow v. Biglow*, 77 N. Y. S. 716; *Abbey v. Shiner*, 5 Tex. Civ. App. 287, 24 S. W. Rep. 91.

⁵⁴ *Belger v. Sanchez* (Cal. 1902), 70 Pac. Rep. 738.

⁵⁵ *Abbey v. Shiner*, 5 Tex. Civ. App. 287, 24 S. W. Rep. 91.

⁵⁶ *Tinder v. Dan's*, 88 Ind. 99.

⁵⁷ *Austin v. Thomson*, 45 N. H. 113.

⁵⁸ *Carver v. Palmer*, 33 Mich. 342.

⁵⁹ *Blake v. Preston*, 67 Vt. 613, 32 Atl. Rep. 491.

time he remains in the premises and the use he makes of them are relevant. If he uses the premises as a place to sell the goods it may be fairly inferred that he accepts the assignment of the lease. But merely selling the goods in the premises for a few days is not a sufficient occupation of them to furnish a basis for an action of use and occupation though perhaps an action in *assumpsit* for debt would lie.⁶⁰ A landlord cannot maintain use and occupation for a year's rent against the assignees of a bankrupt tenant from year to year where he becomes bankrupt in the middle of the year and the assignee enters and retains possession for the remainder of the year. This is not to say that the landlord may not sue and recover rent on a lease under such circumstances where the assignee has not promptly disclaimed. But inasmuch as the action for use and occupation is based solely on the occupation of the person sued, the landlord cannot compel an assignee to pay for any use and occupation except by himself in the absence of an express agreement on the part of the assignee in bankruptcy to pay the reasonable value of the lessee's use and occupation before the assignment.⁶¹ Nor will an action for use and occupation be maintainable against an assignee in bankruptcy for an increased rent which the bankrupt had agreed to pay his landlord in consideration of improvements executed by the landlord.⁶² The question of what the premises are reasonably worth is always for the jury. Evidence may be received by them showing what rent had been formerly paid for it either by the defendant or some prior tenant though they are not thereby bound to infer that the reasonable value of the premises is precisely what they have been leased for.⁶³ The jury may give the landlord a larger sum for the continued occupation than for the original occupation, if there are circumstances to show that such increased rent was expected by the landlord.

§ 366. **Parol evidence to prove use and occupation.** The relation of landlord and tenant as well as the occupation of the premises in an action for use and occupation may be proved by

⁶⁰ *How v. Kennett*, 3 A. & E. 659, 667, 5 N. & M. 1, 1 H. & W. 391, 4 L. J. K. B. 220.

⁶¹ *Naish v. Tatlock*, 2 H. Bl. 320, 3 R. R. 384.

⁶² *Lambert v. Norris*, 2 M. & W. 333, 6 L. J. Ex. 109.

⁶³ *Thetford Corporation v. Tyler*, 8 Q. B. 95, 15 L. J. Q. B. 33, 10 Jur. 68.

parol.⁶⁴ Some cases have held that such evidence is not admissible to prove the relation of landlord and tenant if there be a lease in writing,⁶⁵ but it has also been held that parol evidence would be received in an action for use and occupation though there was a written agreement.⁶⁶ This rule simply amounts to this, that where the landlord sues for use and occupation and has no written lease signed by the occupant he may prove his case by parol evidence and he will not be dismissed merely because the occupant shall subsequently prove a written lease signed by the landlord.⁶⁷ Thus, the production of a written lease under seal and executed by the landlord but never delivered to the tenant because the latter had failed to pay a certain sum of money upon the payment of which he was to receive his lease does not defeat an action for use and occupation.⁶⁸ In an action for use and occupation, a lease void under the statute of frauds, though not admissible or necessary to prove the relation of landlord and tenant, may be consulted to calculate the amount of rent due on it and thus be a guide to fix the value of the use and occupation.⁶⁹ But the rent fixed in the void lease or other writing while it must be given to the jury to aid them in determining value, is by no means conclusive on them as regards this question,⁷⁰ or that such an understanding was not repudiated by the tenant.⁷¹

⁶⁴ *Gibbon v. Kirk*, 1 Q. B. 850, 1 G. & D. 252, 253, 10 L. J. K. B. 297, 6 Jur. 99, following *Wilkins v. Wingate*, 6 Term Rep. 62; *King v. Fraser*, 6 East, 348. See, also, *Egler v. Marsden*, 5 Taunt. 25; *Beverly v. Lincoln Gas Co.*, 6 Ad. & E. 839, 2 N. & P. 283.

⁶⁵ *Rex v. Rawdon*, 3 M. & Ry. 426, 8 B. & C. 708, 7 L. J. (O. S.) K. B. 84; *Brewer v. Palmer*, 3 Esp. 213; *Turner v. Power*, 7 B. & C. 625, M. & M. 131, 6 L. J. (O. S.) K. B. 122.

⁶⁶ *Watson v. King*, 3 C. B. 608, 609; *Tyrwhitt v. Lambert*, 3 P. & D. 676, 10 A. & E. 470; *Elliot v. Rogers*, 4 Esp. 59.

⁶⁷ *Elliott v. Rogers*, 4 Esp. 59.

⁶⁸ *Gudgen v. Besset*, 6 El. & Bl.

986, 26 L. J. Q. B. 36, 3 Jur. (N. S.) 212, 5 W. R. 47.

⁶⁹ *De Medina v. Polson*, Holt, N. P. 47.

⁷⁰ *Tomlinson v. Day*, 5 Moore, 558, 2 Br. & B. 680, 23 R. R. 541.

⁷¹ *Elgar v. Watson*, Car. & M. 494. It is a general rule in all actions brought on an implied or oral contract that after the plaintiff has proved a contract by oral evidence, without an objection, that there is a writing in existence he should not be nonsuited because the defendant produces a written contract, particularly if for any reasons, as, for example, it being unstamped, it was not admissible in evidence. *Fielder v. Ray*, 3 M. & P. 659, 6 Bing. 332, 4

§ 367. **Defenses in an action for use and occupation.** The occupant may show that he was holding adversely to the owner. It is relevant for him to prove all facts which would rebut the presumption that an agreement or contract to pay rent existed. He may also show that he never had the occupation or that he was deprived of it.⁷² Thus, he may prove that by the failure of the landlord to repair according to agreement, he has been deprived of the use and occupation of the premises.⁷³ But the occupant of the premises cannot defeat the recovery of the value of their use by proving that if he had not occupied them they would have been vacant.⁷⁴

§ 368. **Pleading in an action for use and occupation.** A declaration or complaint in an action for use and occupation should set forth the title of the landlord, the possession of the tenant, the letting by the former to the latter, the occupation for a period specified and allege the reasonable value of such occupation.⁷⁵ The complaint need not allege the particulars of the occupation by the defendant.⁷⁶ A complaint which does not allege an agreement to pay the rent express or implied is defective.⁷⁷

Car. & P. 61, 8 L. J. (O. S.) 65, 31 R. R. 429; Doe d. Wood v. Morris, 12 East, 237; Reed v. Deere, 7 B. & C. 266, 2 Car. & P. 624, 31 R. R. 190, 193; Stevens v. Pinney, 8 Taunt. 327.

⁷² Lockwood v. Lockwood, 22 Conn. 425, 429; How v. Kennet, 3 A. & E. 659, 30 E. C. L. 175; Richardson v. Hall, 1 B. & B. 50, 5 E. C. L. 14.

⁷³ Potter v. Truitt, 3 Har. (Del.) 331.

⁷⁴ Newberg v. Cowan, 62 Miss. 570.

⁷⁵ Thompson v. Fox, 45 N. Y. Supp. 1046, 20 Misc. Rep. 421.

⁷⁶ Wilkins v. Wingate, 6 T. R. 62; King v. Fraser, 6 East, 348, 354; Davies v. Edwards, 3 M. & S. 380; Gibson v. Kirk, 1 G. & D. 252, 255.

⁷⁷ Indianapolis, D. & W. Ry. Co. v. First Nat. Bank (Ind. Sup.), 33 N. E. Rep. 679.

CHAPTER XVI.

THE SECURITY FOR THE RENT.

- § 369. Deposit by the lessee as a security for payment of rent.
- 370. The tenant's right to the return of his deposit.
- 371. Deposit made by a tenant with landlord on contract to make a lease.
- 372. The general rule as to liquidated damages.
- 373. Chattel mortgage to secure the payment of the rent.
- 374. Construction of an agreement to give security.
- 375. When the principal and surety on a lease may be sued jointly.
- 376. General rule as to the liability of the guarantor.
- 377. Surety's liability upon a renewal of lease.
- 378. The discharge or release of the surety.

§ 369. **Deposit by the lessee as a security for payment of rent.** Money which has been deposited by the tenant in the hands of the landlord, or of some other person, and which by the express terms of the lease is described as a deposit as security for rent or for the performance of some other covenant of the lease will, as a rule, be regarded by the courts as a penalty merely and not liquidated damages. It is always immaterial that it is called liquidated damages or that it is provided that the deposit shall be forfeited as liquidated damages.¹ Particularly is this true when the only breach of covenant by the lessee is a breach of the covenant to pay rent and the deposit is out of all proportion to the rent due. It is by no means difficult to ascertain the legal damages suffered by the lessor where the lessee neglects to pay rent and for that reason is dispossessed. The presumption in such cases is that the lessor resumed the possession of the premises and has re-let them and if he has done this it is difficult to see any fairness in the prop-

¹ D'Appuzo v. Albright, 76 N. Y. Supp. 654; Bernstein v. Heine-
mann, 23 Misc. Rep. 464, 51 N. Y.
Supp. 467; Carson v. Arvantes, 10
Colo. App. 382, 50 Pac. Rep. 1080.
Where the liquidated damages pro-

vided for in a lease for the breach
of a provision are greatly in ex-
cess of the actual damages, they
will be disregarded. Sharpless v.
Murphy, 7 Del. Co. (Pa.) 22.

osition that he can receive the rent after his lessee has vacated the premises and at the same time retain a large sum of money as damages which sum may be three or four times the actual damages. At the most the deposit will be regarded as security only and if the lessor elects not to accept a surrender he may exhaust the deposit by applying it to arrears of rent as it falls due. This, however, is the most favorable construction that the court will put upon the matter and on the other hand, if the lessor assumes possession and the loss of rent is readily ascertainable and particularly if the loss be small, will treat the deposit as a penalty only and will consider that the lessor has waived any claim he might have to it, either as liquidated damages or as security for the rent by his action in re-entering upon the premises.² Where it is covenanted in the lease that a sum paid to the landlord by the tenant may be retained by the former in case the tenant is dispossessed from the premises by due process of law, the sum thus to be retained is presumptively liquidated damages and not a penalty. The money deposited under such circumstances is to be retained not merely upon a failure by the tenant to pay any one instalment of rent as it becomes due, but to reimburse the landlord for the loss of all subsequently accruing instalments of rent, and such being the case, it is not material whether the sum mentioned is in the opinion of the court too great or too small.³ It is permissible for the parties to fix upon an amount as liquidated damages for a breach of the lease by the tenant and to require him to deposit such sum in the hands of the landlord. In the absence of an express stipulation to that effect and having in view the fact that the damages for a breach of contract to pay rent are easy of computation and ascertainment, the deposit will be regarded as a penalty and the balance thereof, after deducting the rent due, belongs to the tenant,⁴ who may maintain an action to re-

² *Caesar v. Robinson*, 174 N. Y. 492, 498, 67 N. E. Rep. 58, reversing 71 App. Div. 180, 75 N. Y. Supp. 544; *Chaude v. Shepard*, 122 N. Y. 397; *Scott v. Montells*, 109 N. Y. 1, 14 N. Y. S. R. 21, 28; *Weekly Dig.* 159, 15 N. E. Rep. 720.

³ *Longobardi v. Yuliano*, 33 Misc. Rep. 472, 67 N. Y. Supp. 902.

⁴ *Chaude v. Shepard*, 122 N. Y. 397, 400, 25 N. E. Rep. 358; *Scott v. Montells*, 109 N. Y. 1; *Kahn v. Tobias*, 16 Misc. Rep. 83, 37 N. Y. Supp. 632.

cover the same.⁵ Where, however, a tenant is dispossessed for not paying rent, the amount of which is the same as the amount which he has on deposit for security, he cannot recover any part of the deposit.⁶

§ 370. **The tenant's right to the return of his deposit.** A landlord to whom money or personal property is delivered by the tenant to be held by the landlord as security for the payment of the rent or the performance of covenants, is entitled to its absolute possession during the term, and he may maintain

⁵ The failure to pay rent does not operate as a forfeiture. If the deposit is for indemnity the landlord is not confined to it for a remedy. If it is deposited only as security for rent, the landlord must plead as a counterclaim any cause of action he may have against the tenant for the breach of any other covenant in an action by the tenant against him to recover the deposit. *Scott v. Montells*, 14 N. Y. S. R. 21, 109 N. Y. 1, 4, 15 N. E. Rep. 720, 28 Weekly Dig. 159.

⁶ *Sang Shing v. Sire*, 15 Misc. Rep. 139, 36 N. Y. Supp. 466. But see and compare *Rosenquist v. Canary*, 15 Misc. Rep. 148, 36 N. Y. Supp. 979. It was provided that a lessor might, in case of a vacancy "during the term," enter and relet the premises with a deposit to meet any deficiency occurring by reason thereof. The ousting of the tenant for non-payment of rent is a vacancy "during the term," and a deficiency having occurred thereby, the landlord is entitled to recover the deposit. *Baldwin v. Thibaudeau*, 17 N. Y. Supp. 532, 28 Abb. New Cases, 14, 43 N. Y. St. Rep. 157. In Pennsylvania a lessor may, under the act of March 25, 1825, § 2, compel a tenant to give security or to vacate. The tenant must give security before

proceedings to oust him have begun. *Ward v. Wandell*, 10 Pa. St. 98. A subtenant in possession by right or by the landlord's consent may tender the security for rent to protect himself, but a subtenant in possession when the lease forbids subletting has no right to do so, nor can he compel the original lessor to accept it. *Shermer v. Paciells*, 161 Pa. St. 69, 28 Atl. Rep. 995, 34 W. N. C. 252. "The circumstance that the deposit is described in the lease as liquidated damages for a breach of the agreement is not at all conclusive. The character of the deposit, whether liquidated damages or a penalty, depends upon the intention of the parties as disclosed by the situation and by the terms of the instrument. The deposit is not necessarily to be regarded as liquidated damages, although it is expressly so stated in the instrument. Whether it is that or a penalty depends upon the nature of the transaction and the intention of the parties. This has been frequently held in the case of an ordinary lease, and where the amount was largely out of proportion to the damages suffered by the breach of the lease." By the court in *Caesar v. Robinson*, 174 N. Y. 492, on page 496, 67 N. E.

an action to recover possession against any person.⁷ A tenant who has paid all rent due and who has properly performed all the covenants and conditions of the lease on his part is entitled to have his deposit returned and may sue and recover the same upon implied contract or upon the principle of a conversion of the same by the landlord after a demand and refusal to pay. This he may do as soon as the lease is terminated, whether by the natural expiration of the term by the efflux of time or by a surrender or a rescission. The landlord may show in such an action that the tenant has failed to pay the rent or other charges as they have accrued and he may obtain judgment for the amount which the tenant is in arrears. If the tenant has failed to pay rent he has no standing to demand that a deposit to secure rent for the last two months of the term shall be applied to other months for which rent is due. Nor can he resist a dispossession proceedings upon such grounds.⁸ A tenant who has deposited money with his landlord as security in case of his failure to perform, and particularly in case of his default in paying the last three months of rent reserved, may, where he is in default before the three last months and the lease is surrendered, recover from the lessor the amount of deposit in excess of the rent which is due and the taxes which the tenant has agreed to pay.⁹

Rep. 582, reversing 71 App. Div. 180, 75 N. Y. Supp. 544.

⁷ *Chamblee v. McKenzie*, 31 Ark. 155.

⁸ *Rosenquist v. Canary*, 15 Misc. Rep. 148, 36 N. Y. Supp. 979.

⁹ *Hecklan v. Hauser*, 71 N. J. Law, 478, 59 Atl. Rep. 18. A tenant, as security that he would faithfully perform all the covenants of the lease, deposited a sum of money in the hands of his landlord, on which the latter was to pay interest. The money thus deposited was to be applied to pay the rent for the last six months of the term. On the bankruptcy of the landlord during the term it was held that, so far as the

money deposited was concerned, the parties were merely debtor and creditor, and that the tenant could not, while continuing to remain in the premises, refuse to pay his rent and ask to have the deposit applied to the rent merely because the landlord was a bankrupt and the demised premises were threatened with a foreclosure suit, on a mortgage which antedated the lease. The principle laid down in this decision as above set forth is manifestly unjust to the tenant in taking his special deposit and applying it to the debts of the bankrupt landlord. *In re Banner*, 149 Fed. Rep. 936.

§ 371. **Deposit made by a tenant with landlord on contract to make a lease.** The question whether a sum of money is a penalty or is liquidated damages frequently arises when parties enter into an agreement to make a lease, and the tenant deposits with or pays to the landlord a certain sum of money to be applied to the rent as soon as the formal lease is executed. If, through the fault of the prospective tenant and without any fault on the part of the landlord, the future lease is not executed, the deposit is forfeited and becomes the property of the landlord if it was not a penalty but liquidated damages. If, on the other hand, the lease is not executed through the fault of the landlord, the tenant may recover his deposit in an action at law. The question whether the landlord is limited in his damages for a failure of the tenant to make the lease to the amount deposited with him by the tenant frequently arises and is only to be answered after it has been determined whether the deposit is a penalty or liquidated damages. If the deposit is liquidated damages, then the landlord is limited to the recovery of that amount and he cannot recover further damages for the failure of the tenant to execute the lease. Thus, where a tenant who had agreed to take a lease and had deposited a sum of money with the owner of the premises to show his good faith, fails to execute a lease, the extent of the owner's recovery for a breach of contract to take the lease was the sum deposited which was in fact liquidated damages.¹⁰ So, generally a deposit to secure the fulfillment of the depositor's agreement to take a lease and which is not a penalty for a refusal to take it, can be retained only in case of damages actually resulting from the refusal to take the lease. In the absence of an allegation and proof of actual damages, there is no presumption that any damages were received as the result of the refusal to accept the lease, and where damages are not shown, the depositor is entitled to the return of his deposit.¹¹ For if from the terms of the agreement to execute a lease, it is clear that the deposit was to be liquidated damages, the landlord cannot retain it unless he proves that he has been damaged. In determining whether a deposit is liquidated damages or a penalty, the following consideration must be kept in view. Where the subject

¹⁰ Schlumpf v. Sasake, 38 Wash. 278, 80 Pac. Rep. 457.

¹¹ Weinberg v. Greenberger, 93 N. Y. Supp. 530.

matter of a contract is such that the damages for its breach may readily be computed by the application of well established and definite rules, the courts will usually treat the deposit as a penalty especially if there shall be a great difference between the amount of the deposit and the amount which the party who has agreed to execute the lease will lose by the failure of the prospective lessee to accept it. If one who has agreed to lease premises from their owner refuses to do so when called upon it is the duty of the owner to at once proceed to lease the property and the measure of his damages is the loss which he incurs in case he has to accept a lease at a lower rent from some other person than the prospective lessee under the agreement has agreed to pay him. He will not be prevented from recovering this by reason of the fact that the lessee has deposited a merely nominal sum as security that he will take the lease.

§ 372. **The general rule as to liquidated damages.** The parties to a lease or to an agreement to make a lease may agree upon and insert in the lease or agreement any sum as compensation for a breach of the covenants of the lease or for a failure to make the lease, and the courts will be bound by this agreement for liquidated damages where the sum does not exceed the actual damages suffered. But on the other hand, where the sum named is manifestly above the damages which have been suffered, and the damages are such as can readily be proved at law, such sum though it is expressly inserted in the contract and is called liquidated damages by the parties to it, will be regarded by the law as a penalty merely to insure prompt payment or performance. If it shall appear from the evidence that all attempts to get at the actual and certain amount of the damages would be in vain, the courts will incline to accept the estimate of damages which the parties themselves have agreed upon, but if a strict construction of the clause fixing the damages would work injustice or an absurdity, the use of the term liquidated damages will not prevent an inquiry by the court into the actual damages sustained.¹² Upon the general principles of the law of contract, the court will be guided in its inquiry whether the

¹² Consolidated Coal Co. of St. Louis, 150 Ill. 344, 37 N. E. Rep. 469, 5 Sandf. 192; Colwell v. Lawrence, 38 N. Y. 71; Little v. Banks, 937; Cotheal v. Talmage, 9 N. Y. 85 N. Y. 258; Chaude v. Shepard, 551; Bagley v. Peddie, 16 N. Y. 122 N. Y. 397, 401.

sum named is liquidated damages by the language used by the parties as evidence of their intention and also by the facts and circumstances of the case. The use of the words penalty or liquidated damages is not of course controlling, though it may be considered. The ease and difficulty of ascertaining the damages, the size and amount of the deposit as compared with the loss which will be incurred, and the facility with which a new lessee may be secured by the owner, must all be taken into consideration.¹³

§ 373. **Chattel mortgage to secure the payment of the rent.** The tenant may, in order to secure the payment of the rent to the landlord, execute a chattel mortgage to the latter, condi-

¹³ The importance of distinguishing between a forfeiture and liquidated damages lies in the following particulars: If the amount is a penalty, the damages only can be collected, and although judgment be given for the penalty, an execution can issue only for the amount assessed by the jury. On the other hand, where the damages are expressly liquidated by the lease, it constitutes a debt which may be recovered in an action at law upon mere proof of the contract and of the breach without any actual proof of the real damages which have been sustained, if the damages have been pleaded as liquidated. Under such circumstances, if the jury shall find in favor of the plaintiff, they must render a verdict for the whole sum stipulated as damages though it may be too large in proportion. They cannot find for the plaintiff in the actual amount of damages sustained. As to set off of a counterclaim, if the amount is a mere penalty, it cannot be set off. On the other hand, liquidated damages may always be set off in an action brought on a covenant in the lease. Where the action is

brought for liquidated damages, it may be stayed by a tender of the exact amount with interest and costs accompanied by a payment into court. So where the action is for unliquidated damages, the defendant may pay into court a sum of money which he claims to be sufficient to meet the damages incurred by the plaintiff, and if the plaintiff fails to recover a greater sum, he cannot recover costs. In an action to enforce a penalty which is usually of an equitable nature, the payment of the penalty in court does not in the absence of an express statute, prevent the enforcement of a forfeiture. The defendant's remedy in such cases is an equitable one. So, also, though a court of equity will, where the circumstances require it, grant relief against a forfeiture arising from an enforcement of a penalty, it will not restrain an action to recover liquidated damages. Nor will it restrain the tenant from doing an act during the term upon the land which he may do at the risk of paying liquidated damages. In conclusion, it should be said, an increase in rent, though not in the nature of liqui-

tioned to be void if the rent is promptly and fully paid. The general rules applicable to the subject of chattel mortgages are applicable to the case. Thus, the assignee of the mortgage stands in the place and stead of his assignor, the lessor, and where the lessor is also the mortgagor of the premises, the assignee takes the chattel mortgage subject to the rights of the mortgagee of the realty and to a foreclosure action then pending. Where, pending a foreclosure, a person takes a lease from the mortgagor, securing the rent by a chattel mortgage which is subsequently assigned, the assignee though no party to the foreclosure, takes subject to all the equities and infirmities produced by the final decree in foreclosure. He is not bound by proceedings to appoint a receiver or to compel the tenant to pay the rent to such receiver unless he shall have notice to which he is entitled. The court will examine the equities of the several claimants to the rents during the pendency of the foreclosure proceedings. If the plaintiff in foreclosure has neglected to include the rents in his security, he has no equitable claim as against the chattel mortgagee (the owner of the equity) or his assignee. All that the mortgagee is entitled to is the immediate possession of the premises as security for his debt from the date a receiver is appointed but he has no right to any possession as to rents accruing before that time.¹⁴ The fact that a landlord, holding a mortgage on his tenant's chattels as security for the rent, takes possession of them on their abandonment by the tenant does not work a satisfaction of the debt.¹⁵ He may sue and recover the balance due in an action either of debt or covenant. A mortgage given by the tenant on his future crops to secure the rent during the term is valid. Any property which may be sold may also be mortgaged. If the crops are to be grown upon the land and the tenant is in actual possession of it, the future crops are then an accretion and addition to the land which may reasonably be expected to come into existence during the term and hence they may be mortgaged.¹⁶ On the

dated damages, may be distrained for, but a penalty can never be distrained for.

¹⁴ Zeiter v. Bowman, 6 Barb. (N. Y.) 133.

¹⁵ Lathers v. Hunt, 13 N. Y.

Supp. 813. See, also, same case. 10 N. Y. Supp. 1029, 16 Daly (N. Y.) 349, 19 N. Y. Supp. 494, 30 N. Y. St. Rep. 432.

¹⁶ Jones v. Webster, 48 Ala. 109, 112.

other hand, if the tenant though he may mortgage his own crops which will be the result of his own labor, shall attempt to secure his rent by a mortgage on a crop raised by another, though upon the same land, the mortgage will be unenforceable for the mortgagor has no title and may never have one. Lessees interested as co-partners in the tilling of the premises and who are to receive a share of the future crop are bound by a mortgage by one of their number of the future crop as security for rent, though it be not recorded.¹⁷

§ 374. **Construction of an agreement to give security.** An agreement that a tenant shall give sufficient security for rent is satisfied by either personal security or security upon real estate so long as it is adequate. The fact that real estate given as security is incumbered is not alone conclusive that it is insufficient. It may on the contrary, be abundantly adequate. The tenant is not bound to execute and tender a mortgage if the landlord refuses to accept real estate offered as security. The law does not require the performance of a useless ceremony. Nor is the tenant bound to give the landlord under such circumstances any more explicit information as to the nature and value of the property. The tenant has the whole of the day on which the lease is to commence to furnish the security and though he may have refused or declined to furnish it in the earlier part of the day, he may change his mind and do so subsequently during the day.¹⁸

§ 375. **When the principal and the surety on a lease may be sued jointly.** A person who in the character of a surety joins in the execution of the lease and agrees to pay the rent in case the lessee does not is primarily liable and may, and indeed must, be joined as a defendant in an action by the lessor for the rent.¹⁹ Thus, where a lease is signed by A whose name is in after the name of the latter there are the words "as security for A," both may be joined²⁰ in an action. The liability of the principal and surety must be created by the same instrument in order that they may be joined as defendants.²¹ A person who

¹⁷ Jones v. Webster, 48 Ala. 109, 112.

¹⁸ Hard v. Brown, 18 Vt. 87, 97.

¹⁹ McLott v. Savery, 11 Iowa, 323, 325; City of Philadelphia v.

Reeves, 48 Pa. St. 472; Carman v. Plass, 23 N. Y. 286, 287.

²⁰ Decker v. Gaylord, 8 Hun (N. Y.) 110.

²¹ Carman v. Plass, 23 N. Y. 286.

by an independent writing executed after the lease has been signed,²² or by an indorsement upon the lease,²³ becomes a surety for the lessee, is not within the rule and cannot be joined with his principal in an action brought against the tenant to recover the rent.

§ 376. **General rule as to the liability of the guarantor.** In the case of a guarantee of the payment of rent under seal, a consideration need not be expressed but will be presumed from the fact of a seal being attached.²⁴ The consideration for a guarantee of rent need not proceed from the lessor to the guarantor. The acceptance of the lessee and his entry into possession by the permission of the lessor will ordinarily be a sufficient consideration. So, an agreement by a lessee who occupies the demised premises as a saloon that he will sell the beer manufactured and sold by the guarantor is a sufficient consideration for the contract of guaranty.²⁵ If there is no express requirement in the guarantee that the lessor shall first obtain judgment against the lessee as a condition precedent to the guarantor being called upon to pay, none can be implied. The failure of the lessee to pay the rent when it accrues is a breach of covenant and the lessor may at once proceed against the guarantor. It is the duty of the guarantor to ascertain whether the lessee has kept his covenants with the lessor and to know whether he has paid rent and the lessor is not for this reason required to give

²² *Tourtellott v. Junkin*, 4 Blackf. (Ind.) 483; *Phalen v. Dinger*, 4 E. D. Smith (N. Y.) 379.

²³ *Virden v. Ellsworth*, 15 Ind. 144. *Contra*, as to a surety by indorsement on the lease where the statute expressly provides that persons "severally liable on the same instrument, including sureties on the same instrument," may be sued together. *Lucy v. Wilkins*, 33 Minn. 21, 21 N. W. Rep. 849.

²⁴ *Roth v. Adams*, 185 Mass. 341, 70 N. E. Rep. 445.

²⁵ *Standard Brewery v. Kelly*, 66 Ill. App. 267, holding also that where a brewing company guarantees the lease of a saloonkeeper on consideration that he will sell

its beer alone, and receives the benefit of the contract, it is estopped, as against the lessor, from asserting that its contract was *ultra vires*. A guarantor who guarantees a saloonkeeper's lease on an agreement of the latter to sell his beer, with a provision in the lease that it will not be assigned by the lessee without the consent of the guarantor, or that the premises will not be used for anything but saloon purposes, has a beneficial interest in the lease and it cannot be surrendered without his consent. *St. Louis Brewing Ass'n v. Kaltenbach*, 108 Mo. App. 637, 84 S. W. Rep. 151.

notice to the guarantor of the default of the lessee in the payment of the rent as a condition precedent to bringing an action against the guarantor.²⁶ A lessee who has assigned the lease and has guaranteed the payment of the rent by the assignee is not entitled to notice of the default of the latter.²⁷ If, however, it is stipulated in the contract of guarantee that a demand for the rent shall be first made upon the tenant a demand and a refusal of the tenant to pay must be proved as a part of the plaintiff's case.²⁸ If after the surety or guarantor has entered into his contract, the terms of the lease are altered by an agreement between the landlord and the tenant without the consent of the surety or guarantor, the liability of the latter is then at an end for the reason that the covenants of the lease are no longer binding on the tenant, he having been released by the making of a new contract.²⁹ The change or alteration of the lease does not, however, defeat the liability of the surety or guarantor as to rent or breaches of covenants in the lease which have accrued before the damage was made. Nor is the surety released from his liability to pay accrued rent by the fact that the landlord accepts a surrender of the premises and expressly releases the tenant from the payment of subsequent rent.³⁰

§ 377. **Surety's liability upon a renewal of lease.** The liability of one who has guaranteed the payment of rent on a lease which provides for a renewal at the option of the lessee continues during the new term which the lessee elects to take if it is merely an extension or continuance of the old term. Thus, if the lease be for one year with an option to extend it for four years and the lessee executes the option by remaining in possession and paying rent or by giving notice to the lessor where a notice is required by the lease, the liability of the guarantor continues down to the end of the second or extended term. The surety cannot thereafter relieve himself of liability on the new term by notice to the lessor that he will not be liable.³¹ The

²⁶ *Roth v. Adams*, 185 Mass. 341, 70 N. E. Rep. 445. See, also, *Hayes v. Kyle*, 8 Allen (Mass.) 300, 301; *Welch v. Walsh*, 177 Mass. 555, 59 N. E. Rep. 440.

²⁷ *Giergen v. Schmidt*, 69 Ill. App. 538.

²⁸ *Folsom v. Squire*, 70 N. J. Law, 430, 60 Atl. Rep. 1102.

²⁹ *People v. Vilas*, 36 N. Y. 457; *Grant v. Smith*, 46 N. Y. 93.

³⁰ *Kingsbury v. Westfall*, 61 N. Y. 361.

³¹ *Shand v. McCloskey*, 27 Pa. Super. Ct. Rep. 260.

surety is bound to ascertain the rights and privileges of the parties to the lease which he has guaranteed. The option in the tenant to have an extension if he shall so elect being in the original lease with which it will be presumed the surety is familiar, he will be bound not only during the original term but also during any possible term for which the lease is extended. If the lease upon which he is surety instead of providing for an extension requires the execution of a new lease upon the request or demand of the tenant, the surety will not necessarily be bound to see to the performance of the stipulations by the lessee under the new lease unless he expressly agrees to do so. The termination of the original lease and the execution of a new one by the parties will be regarded in law as a surrender of the former lease by which the liabilities of the parties under the old lease are absolutely terminated.

§ 378. **The discharge or release of the surety.** Under general principles of the law of contract, a surety for the payment of the rent or the performance of other covenants by the tenant will be discharged from all liability under circumstances where the tenant is discharged. The payment by the tenant of the rent discharges the surety, but where the payment is made in the shape of a note by the tenant, it is no discharge of the surety unless the note is paid at maturity where it is not expressly agreed that the note is to be accepted in payment.³² Thus, even the giving of a note by the tenant which is secured by a chattel mortgage is not a payment.³³ The surrender of the premises by the lessee and their acceptance by the lessor will at once terminate the liability of a person who has agreed to guarantee the payment of the rent. So, also, the lessee is entitled on a surrender or rescission of the lease to be repaid by the lessor the amount of money deposited by him as security for the payment of rent or for the performance of the stipulations of the lease, if he is not in default, or if he is in default such an

³² *Kendig v. Kendig*, 3 Pitts. 287; *Woodbridge v. Richardson*, 2 T. C. (N. Y.) 418.

³³ In a case where the defendant was sued on his guarantee to pay the rent, it was claimed that the tenant was released by the

landlord accepting a draft drawn on a third person, and it was held that this was not a payment unless it was mutually understood to be a payment by all the parties to the lease. *Bernham v. Hubbard*, 36 Conn. 539.

amount of the deposit as he may be entitled after deducting the rent then due and in arrears.³⁴ Where a lessee sublet and vacated the premises leaving a deposit in the hands of the lessor, the lessee is entitled to the return of his deposit upon the lessor subsequently accepting a surrender from the subtenant.³⁵ In the action against one who has guaranteed the payment of the rent, it is a good defense to show that the tenant has assigned his lease with the consent of the landlord and without the consent of the guarantor. For it is a general rule of the law of guarantee that if the person who is guaranteed releases the principal debtor, the guarantor is also released. Hence, if the landlord consents to the assignment of the lease and accepts the assignee as his tenant and it is clear that the landlord intended thereby to release the tenant from his liability to pay rent, and this was done without the knowledge of the guarantor, it is a good defense in an action by the landlord against the guarantor; and a judgment for the rent taken by the landlord against the tenant after the latter had assigned his lease does not preclude the guarantor in an action brought against him from showing all the facts relating to the assignment of the lease by the tenant.³⁶ The surety is not released if the tenant abandons the premises without a sufficient legal cause even though the lessor by his own motion or at the request of the surety, rents them to some other person.³⁷ Where the lease provides that the landlord may re-let the premises if they become vacant and apply the proceeds of the re-letting to the former tenant's indebtedness, and a surety, on learning that the tenant cannot pay the rent, informs the landlord that he must re-let the premises and he does so, and the original tenant removed and the new tenant agrees to pay rent, it was held that this not being a surrender, the former tenant and his surety were still liable.³⁸ So, the mere fact that a landlord finds a stranger in possession of the premises before the term has expired and receives the rent from him, does not release the surety, particularly where the lessor

³⁴ Kahn v. Tobias, 16 Misc. Rep. 83, 37 N. Y. Supp. 632.

³⁵ Carson v. Arvantes, 10 Colo. App. 382, 50 Pac. Rep. 1080.

³⁶ Fleck v. Fieldman, 104 N. Y. Supp. 366.

³⁷ McKensie v. Farrel, 4 Bosw. (N. Y.) 192.

³⁸ Ogden v. Rowe, 3 E. D. Smith (N. Y.) 312.

had not been notified that the lessee had assigned or sublet the premises.³⁹ If there is evidence of a surrender either express or in contemplation of law, the surety is released from rent subsequently accruing, but not for rent which had accrued prior to the surrender. Thus where a landlord accepted the possession of the premises from the sub-tenant, receiving from him goods which he agreed to sell and to accept the proceeds in release and discharge of the rent which might be due him from the original lessee up to the surrender, the surety would be discharged, and the original lessee may at once recover a deposit made by him as security for the rent as his liability for future rent is at an end.⁴⁰ The eviction of the tenant by the landlord or by a paramount title inasmuch as it puts an end to the rights and liabilities of the parties to the lease, releases the surety of the tenant from all liability which would accrue after the date of the eviction. It must appear, however, that there was an actual ouster of the tenant for anything short of this, though consisting of a trespass or an interference with the convenience and enjoyment of the premises by the tenant, will not release the surety. So, a surety cannot set up in an action brought against him by the landlord the fact that the buildings were destroyed by fire, where the landlord has covenanted to rebuild them.⁴¹ But it is likely where the matter is regulated by the modern statutes which provide that a destruction of the premises shall put an end to the lease, that where the premises are totally destroyed by fire or other casualty, so that the liability for rent on the part of the tenant is at an end, the surety would also be released. Anything which releases a surety from his liability for a tenant will also entitle the tenant to the repayment of money deposited by him as security for rent. So, a surety is discharged where during the term, the lessor sells a portion of the premises with the consent of the lessee,⁴² and where the tenant is evicted from the premises during the term because they are sold, the lessor must refund money which has been deposited

³⁹ Wood v. Welz, 40 App. Div. 202, 57 N. Y. Supp. 1121, affirmed in 167 N. Y. 570, 60 N. E. Rep. 1122.

⁴⁰ Carson v. Arvantes, 10 Colo. App. 382, 59 Pac. Rep. 737, af-

firming 10 Colo. App. 382, 50 Pac. Rep. 1080.

⁴¹ Kingsbury v. Westfall, 61 N. Y. 359.

⁴² Stern v. Sawyer, 78 Vt. 5, 61 Atl. Rep. 36.

by the tenant for the faithful performance of the covenants of his lease.⁴³ The surety is bound only during the term actually named in the lease. If the tenant holds over, the surety is not bound for the rent beyond the first year, though the lease is for one year, "with the privilege of the lessee to retain the house as long as he may wish."⁴⁴ The contrary is the rule where the lease is for one year certain, "and for another year if the tenant holds over." The surety continues liable after the one year term and during all the second year in case the tenant desires to hold over.⁴⁵ The liability of one who guarantees the payment of rent by a tenant under a lease with a privilege of a renewal is co-extensive with the longest possible term which may be created by a renewal.⁴⁶

⁴³ *Degnario v. Sire*, 34 Misc. Rep. 163, 68 N. Y. Supp. 789. The issuance of a warrant in a summary proceeding to secure possession when it terminates the liabilities of the parties to one another under the lease releases the guarantor and enables the tenant to obtain the return of his deposit. A deposit as security for the payment of rent does not become the property of the lessor after he has ousted the lessee in summary proceedings. *Yannuzzi v. Grape*, 92 N. Y. Supp. 819. The parties may, however, by their express words used in the lease provide that a deposit may be forfeited as liquidated damages if the lessee is ousted by legal proceedings and if such be the case and the lessee is ousted in summary proceedings for the non-payment of rent which does not equal the deposit, the lessee cannot recover the balance. *Longobardi v. Yuliano*, 33 Misc. Rep. 472, 67 N. Y. Supp. 902. So where the lessor has an option under the lease to

dispossess the lessee or to resort to a deposit for re-imbursement with a right to re-enter on default in the payment of rent, the issuance of a warrant in summary proceedings before the end of the term does not entitle the tenant to recover the deposit. *Anzalone v. Paskusz*, 96 App. Div. 188, 89 N. Y. Supp. 203.

⁴⁴ *Brewer v. Thorp*, 35 Ala. 9.

⁴⁵ *Coe v. Hodges*, 71 Pa. St. 383.

⁴⁶ *Heffron v. Treber* (S. D. 1907), 110 N. W. Rep. 781. Also holding that in a case where a tenant had the privilege of a renewal for two years his holding over without any new agreement would be presumed to be an election on his part to renew the lease for two years and not a mere holding over with the consent of the landlord by which otherwise he would under a state statute be a tenant for one year only. The guarantor of the payment of the rent continued liable for the renewal term of two years.

CHAPTER XVII.

THE COVENANTS OF THE LEASE.

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- 381. The construction of covenants in leases.
- 382. What are the usual and proper covenants
- 383. Whether covenants are joint or several.
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§ 379. **Definitions and general considerations.** Before considering in detail the character of the particular covenants which are either expressed or implied in a lease, it may be proper to consider some, at least, of the rules regulating covenants in general. A covenant may be defined as an agreement between two or more persons in writing and under seal by which either party stipulates that certain facts are true, or promises to perform or give something to the other party or to abstain from the doing of some certain act.¹ Such an agreement when expressed, may be couched in any sort of language which shows the intention of the parties to it for the law prescribes no special form of words necessary to constitute a covenant.² Thus it is not necessary that a stipulation which is alleged to be a covenant shall contain that word or any other particular word, if it is possible to gather the intent of the parties that it shall bind them from the language which they have used in any part of the writing.³ Covenants are divided into those which are express and those which are implied, but this division has relation to the formal expression of the intent by the parties rather than to the intent itself.⁴ An express covenant is one which is expressly stated to be such in the language which the parties themselves have used. An implied covenant is one which is created by construction from the implication contained in the use of particular words, which in themselves do not constitute an express covenant. Thus, as examples of implied covenants contained in the lease, we may instance the implied covenant on the part of the lessor that the lessee shall be secured in the quiet possession of the premises and the implied

¹ Bouv. Law Dict.

² Wright v. Tuttle, 4 Day (Conn.) 313; Kendal v. Talbot, 2 Bibb (Ky.) 614; Yocum v. Barnes, 8 B. Mon. (Ky.) 496, 497; Hollinsworth v. Johnson, 48 Mich. 140, 11 N. W. Rep. 843; Vincent v. Crane, 10 Det. Leg. N. 653, 97 N. W. Rep. 34, 35; Fletcher v. Chamberlin, 61 N. H. 438; Hallett v. Wylie, 3 Johns. (N. Y.) 44, 48, 3 Am. Dec. 457; Bull v. Follett, 5 Cow. (N. Y.) 170, 171; Campbell v. Schrum, 3 Watts (Pa.) 60;

Taylor v. Preston, 79 Pa. St. 436; Mitchell v. Hazen, 4 Conn. 495, 508, 10 Am. Dec. 169; Randel v. Chesapeake & D. Canal Co., 1 Har. (Del.) 233; Lovering v. Lovering, 13 N. H. 513; Midgett v. Brooks, 12 Ired. L. (N. C.) 145, 55 Am. Dec. 405.

³ Newcomb v. Presbrey, 9 Met. (Mass.) 406, 410.

⁴ As to the definition of a covenant in a lease, see Brooks v. Drysdale, 3 C. P. D. 52, 37 L. T. 467, 26 W. R. 331.

covenant to pay rent on the part of the lessee, both of which are conclusively presumed to be contained in every lease and in theory to arise from the relation of landlord and tenant created by the lease, though there be not one word in the lease expressive of an intention on the part of the landlord to guarantee possessentative if the latter is named in the covenant but which do the landlord. Another division of covenants is into those which are personal and those which are real. Personal covenants are those which bind only the covenantor and his personal representative if the latter are named in the covenant but which do not pass with the transfer of the special matter to which they relate. Such covenants, it may be said in passing, are broken if at all, as soon as they are made and an action may be maintained by the covenantee to recover damages at once. A real covenant is one that in ordinary language is said to run with the land. In other words, it is one so related to the land that the owner of the land or of an interest in the land is by the fact of ownership entitled to the benefit of the covenant, though he has not been named in it. He may, therefore, bring an action to enforce the covenant as soon as it is broken, though he was not a party to the deed or writing in which it was contained. Covenants are also divided into those which are independent and those which are dependent. Where the duty to perform one's covenant depends upon performance by the other party of another covenant, the covenants are dependent and the party who would take advantage of the breach of the other to perform his covenant, must himself perform what he is bound to do before he can maintain his action. Thus, where two acts are to be done by the parties respectively at the same time, neither can maintain an action against the other without showing either that he has performed his own covenant or that he has offered the other to perform his covenant and has been prevented by the latter from doing so.⁵ Independent covenants are those by which the parties are bound to do different things at different times. The doing of one of these things by either is not a condition precedent to his right to recover damages for a failure

⁵ *Pordage v. Cole*, 1 Saund. 320; *R. Co.*, 12 Oreg. 488, 491, 8 Pac. Manuel v. Campbell, 3 Ark. 324; Rep. 544; *Cassell v. Cooke*, 8 S. Harrison v. Taylor, 3 A. K. Marsh. & R. (Pa.) 268, 11 Am. Dec. 610. (Ky.) 168; *Powell v. D. S. & G. R.*

on the part of the other party to keep his covenant.⁶ Covenants are independent or dependent according to the fair intention of the parties as it manifests itself upon the language employed by them.⁷

⁶ *Houston v. Spruance*, 4 Harr. (Del.) 117; *Morrison v. Galloway*, 2 Har. & J. (Md.) 461; *Benson v. Hobbs*, 4 Har. & J. (Md.) 285; *Davis v. Wiley*, 4 Ill. 234; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377; *McCullough v. Cox*, 6 Barb. (N. Y.) 386, 390; *Obermyer v. Nichols*, 6 Binn. (Pa.) 159, 6 Am. Dec. 439; *McCrelish v. Churchman*, 4 Rawle (Pa.) 26; *Lowber v. Bangs*, 2 Wall. (U. S.) 728, 17 L. ed. 768.

⁷ A covenant to pay rent and a covenant by the lessor to make alterations and repairs during the term are independent. *Thompson-Houston Electric Co. v. Durant Land Imp. Co.*, 144 N. Y. 34, 39 N. E. Rep. 7. The lessee's covenant to pay taxes and the lessor's covenant to permit the lessee to remove improvements are independent. The covenant to allow the lessee to remove his improvements may be enforced in equity, though the lessee has not paid the taxes. *Strohmeyer v. Zeppenfeld*, 28 Mo. App. 268. In *McCullough v. Cox*, 6 Barb. (N. Y.) 386, on page 390, the court said: "The first question to be considered is, whether the covenants on the part of the plaintiff, which are contained in these instruments, are conditions precedent. This must depend upon the intention of the parties, as it is to be collected from the instrument in which the covenants are contained. *Porter v. Shepard*, 6 T. R. 668; *Glazebrook v. Woodrow*, 8 T. R. 366, 371; *Retchie v.*

Atkinson, 10 East, 295; *Havelock v. Geddes*, 10 East, 559. There is also another rule of construction which has been adopted for the purpose of ascertaining whether covenants are conditions precedent or not, and that is, that where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other, but where the covenants go only to a part of the consideration, then a remedy lies on the covenants, to recover damages for a breach of it, but it is not a condition precedent." So in *Davis v. Wiley*, 4 Ill. 234, the court said: "When covenants are independent, performance need not be averred, but otherwise when they are dependent. It is then essential that the plaintiff should aver performance, or an offer to perform his part of the covenant. In the classification of covenants, some of the old cases proceeded upon distinctions extremely nice and technical, but the governing rule to be deduced from modern authorities, is that covenants are to be construed to be dependent or independent, according to the intention of the parties, and the good sense of the case, and that technical words should give way to such intention. *Luna v. Gage*, 37 Ill. 27. According then to this rule the covenants of the parties in this case must be understood as mutual and dependent. Although the time for the payment of the money is fixed by the articles of agree-

§ 380. **The language by which a covenant is created.** Covenants may be created by very informal language. Any words in a deed or contract under seal which show an agreement on the part of either party to do or not to do a certain thing amount to a covenant. For the law requires no particular form of the words in order to constitute a covenant in a lease. If it clearly appears from the language of a lease under seal that either one of the parties has agreed to do or to abstain from doing a particular thing, it will be a covenant. The words "covenant" and "agree" are proper and are usually employed in leases but they may be dispensed with and their use does not of necessity create a covenant if it appears that the minds of the parties did not meet upon the act which was to be performed by either of them.⁸ Thus, for illustration, a provision that "the lessee shall repair the buildings demised as often as necessary and shall leave them repaired at the end of the term" is a covenant by the lessee to repair and leave in repair.⁹ So, there need not be an express promise on the part of the covenantor. The mere statement that he has agreed or For it is very well settled that a mere recital in a lease or a statement in a lease that it has been agreed that the landlord shall furnish lumber with which the tenant is to repair is a covenant on the part of the landlord to furnish the lumber.¹⁰ For it is very well stated that a mere recital in a lease or a statement that something has been agreed upon or an exception contained in a covenant by one party to the lease may amount to a covenant.¹¹ If either party to the lease shall covenant to do a certain thing and in the covenant shall insert an exception the exception may amount to a covenant not to do the

ment, yet it is evident from the general tenor of the instrument, as well as from some of its stipulations, that the time of payment was fixed in anticipation of the prior performance of the labor."

⁸ *St. Albans v. Ellis*, 16 East, 352, 354; *Hollis v. Carr*, 2 Mod. 87; *Comyn's Digest*, tit. "Covenant;" *Lunt v. Norris*, 1 Burr. 290; *Hill v. Carr*, 1 Ch. Cas. 294; *Bret v. Cumberland*, Cro. Jac. 399.

⁹ *Bret v. Cumberland*, Cro. Jac. 399.

¹⁰ *Holder v. Taylor*, Brownl. 23.

¹¹ *Sampson v. Easterby*, 9 B. & C. 505; *Say v. Mattram*, 19 Com. Bench (N. S.) 479; *Farrall v. Hilditch*, 5 Com. Bench (N. S.) 840; *St. Albans v. Ellis*, 16 East, 352; *Horry v. Frost*, 10 Rich. (S. C.) Eq. 109; *Penn v. Preston*, 2 Rawle (Pa.) 14; *Lowell v. Hilton*, 11 Gray (Mass.) 407; *Huff v. Nickerson*, 27 Me. 106.

thing excepted. Thus, a covenant by a tenant of a farm to plow and sow all the land excepting a certain tract constituted an implied covenant on the part of the tenant not to plow and sow the tract excepted.¹² The doctrine of implied covenants from recitals or statements in the lease has been greatly extended. Thus, a recital by the landlord that he is possessed of a certain interest in the demised premises implies a covenant on his part that he is possessed of such an interest.¹³ And where the tenant agrees to repair premises "the same having been previously put in good repair" it was held that the language quoted constituted and implied an absolute covenant on the part of the landlord to repair which he must perform before the tenant would have to repair.¹⁴ So where a tenant expressly covenanted that he would fold his flock of sheep which he should keep upon the premises upon such parts thereof as the same had been usually folded a covenant on his part was implied to keep a flock of sheep upon the premises.¹⁵ So, a covenant by the tenant that he will from time to time supply the landlord with certain articles to be manufactured on the premises raises an implied covenant on the part of the tenant to manufacture such articles on the premises. The tenant cannot refuse to furnish the articles or escape his liability for a failure to do so by showing that no such articles were manufactured on the premises.¹⁶

¹² *St. Albans v. Ellis*, 16 East, 352.

¹³ *Severn's Case*, 1 Leon. 122; *Aspdin v. Austin*, 5 Q. B. 671, 683.

¹⁴ *Connock v. Jones*, 3 Exch. 233.

¹⁵ *Webb v. Plummer*, 2 B. & Ald. 746, 749, 751.

¹⁶ *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487. The rule that covenants may be implied from recitals has been limited. Thus commenting on the cases of *Sampson v. Easterly*, 9 B. & C. 505, affirmed 6 Bing. 644, and *Saltorn v. Houston*, 1 Bing 433, the court in *Aspdin v. Austin*, 5 Q. B. 671, on page 683, said: "We have examined these and several earlier cases which were cited in the

argument in the latter case; and upon consideration, they do not appear to us to support the proposition for which the plaintiff contends to the extent to which it is necessary for him to carry it. It will be found in those cases that where words of recital or reference manifested a clear intention that the parties should do certain acts, the courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance, as if the instruments had contained express covenants to perform them. But it is a manifest extension of that principle to hold, where parties have expressly covenanted to perform cer-

§ 381. The construction of covenants in leases. It is a uniform rule that all covenants in leases must be construed as nearly as possible according to the intention of the parties to be gathered from the whole context of the lease and according to the reasonable sense of the words to be used by them.¹⁷ The attempt of the court should be to support the lease rather than to make it void for uncertainty. The lease ought to be so construed that every word in it will be effective if possible and for this purpose all the words of the lease should be read by the court in order to ascertain the general intention. The terms of the covenant ought to be understood in their plain, ordinary and popular sense, unless they possess in respect to the subject matter of the lease a peculiar and particular sense which differs from the popular sense.¹⁸ Technical words, however, are to be construed as they are understood by persons conversant with the particular subject to which they relate, unless from the context it is very clear that the parties to the lease used such words in a different and popular sense.¹⁹ In construing a covenant in a

tain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of the express contract. Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications, the presumption is, that having expressed some, they have expressed all the conditions by which they intend to be bound under the instrument."

¹⁷ Vaughn v. Matlock, 23 Ark. 9; Watchman v. Crook, 5 Gill. & J. 239, 255; Quackenboss v. Lansing, 6 Johns. (N. Y.) 49, 50; Marvin v. Stone, 2 Cow. (N. Y.) 781; Dunn v. Dunn, 3 Colo. 510; Davis v. Lyman, 6 Conn. 249; Howard Mfg. Co. v. Water-Lot Co., 39 Ga. 574; Wadlington v. Hill, 18 Miss. 569; Whalen v. Kauffman, 19 Johns. (N. Y.) 97; Clark v. Devoe, 124 N. Y. 120; 26 N. E. Rep.

275; Shoenberger's Ex'rs v. Hay, 40 Pa. St. 132; Halloway v. Lacy, 23 Tenn. 468; James v. Adams, 64 Tex. 193.

¹⁸ Rogers v. Dansworth, 9 N. J. Eq. 289; Morrison v. Galloway (Md.), 2 Har. & J. (Md.) 461; Benson v. Hobbs (Md.), 4 Har. & J. 285; Goodwin v. Holbrooke, 4 Wend. (N. Y.) 377; Obermyer v. Nichols, 6 Binn. (Pa.) 159, 161, 6 Am. Dec. 439; Lowber v. Bangs, 69 U. S. 728, 17 L. ed. 768; Houston v. Spruance (Del.), 4 Har. 117; McCullough v. Cox (N. Y.), 6 Barb. 386; Lord Ellenborough in Robertson v. French, 4 East, 130, on page 137; Mallan v. May, 13 Mee. & Wel. 511; Scott v. Bourdillion, 5 Bos. & Pul. 213.

¹⁹ Davis v. Willey, 4 Ill. 234; Lunn v. Gage, 37 Ill. 19, 87 Am. Dec. 233; McCrelish v. Churchman, 4 Rawle (Pa.) 26; Lee v. Mosley, 1 You. & C. 607; Sander-son v. Dobson, 1 Exch. 145.

lease by indenture the words of the covenant are to be regarded as the words of the party to whom they properly belong or if the words properly belong to both, as the words of both parties. In the absence of an express limitation to one party the covenant in the lease by indenture will be obligatory on both parties or on either according to the circumstances and the language of the covenant will be construed as the language of both, or either though it is expressly stated to be the covenant of one only. Doubtful words in the covenant will be applied to him to whom they most properly belong according to the whole intention of the parties. They are not taken more strongly against one or more beneficially to the other as in the case of covenants in a deed-poll.²⁰ A general covenant for quiet enjoyment in a lease is not affected by a subsequent covenant of the landlord to defend the lessee's title, unless the covenants are inconsistent, or it expressly appears that it was intended that the second covenant should limit the first.²¹ In the case of a lease for a long term of business property in a rapidly growing section in which there are old buildings at the date of the lease with a provision that the lessee shall erect a substantial business building thereon, it may be clearly inferred that the principal intent of the lessor was to procure the prompt erection of such a building. This appears under the circumstances of the parties and from the manifest improvement and advantage to the owner which would result from the placing of the building on his property. Hence, a stipulation that there shall be a forfeiture upon a default in the payment of rent or in the performance of any of the covenants or agreements on the part of the lessee to be performed, is not confined in its operation to a default in the payment of rent, but includes any default in the performance of the covenant to build as this was clearly the intent of the parties. Upon the failure of the lessee to perform this covenant to build, the lease is forfeited.²² In construing the implied covenants of warranty and of quiet enjoyment in a lease for a term of years they have been held to expire with the term. If a lessor's estate shall expire during the term and the lessee is thereupon evicted by a

²⁰ Beckwith v. Howard, 6 R. I. 1, 9; Shepard's Touchstone, 52.

²¹ Sheets v. Jozner, 11 Ind. App 209, 38 N. E. Rep. 830.

²² Lindeke v. Associates Realty Co. (C. C. A.), 146 Fed. Rep. 630.

title paramount, no action can be maintained by the lessee or his assignee against the lessor for the breach of the implied covenant of quiet enjoyment or of title as such covenants terminate with the expiration of the lessor's estate.²³ Hence if a tenant for life makes a lease for years and dies before its expiration and the remaindermen evict the lessee of the life tenant no action on the implied covenant will lie against the lessor's representative.²⁴

§ 382. What are the usual and proper covenants. In construing an agreement to execute a lease which shall contain the

²³ Baynes v. Lloyd (1895), 2 Q. B. 610, 14 Reports, 678.

²⁴ McCowry v. Croghan's Adm'r, 31 Pa. St. 22, 24; Gervis v. Peade, Cro. Eliz. 615; Swan v. Stransham, 3 Dyer, 267a; Adams v. Gibney, 4 M. & P. 491, 6 Bing. 656. In Adams v. Gibney, 6 Bing. 656, where a person took a lease from a life tenant without any express covenant of quiet enjoyment it was held that the lessee from the life tenant could not upon his eviction by the remainderman on the death of the life tenant maintain covenant against the executor of the life tenant. In this case the court said that the executors were not charged with a covenant in law because a covenant in law or as we would say an implied covenant ends and determines with the estate and interest of the lessor. For a covenant in law should not extend to make one do more than he can which was to warrant possession as long as he lived and no longer. "A covenant is simply a contract of a special nature, and the primary rule for the interpretation thereof is to gather the intention of the parties from their words by reading not simply a single clause in the instrument, but the entire context and where the meaning is doubtful, by consider-

ing such surrounding circumstances as they are presumed to have considered when their minds met." Clark v. Devoe, 124 N. Y. 120, 124. We may say *in limine*, that whatever may have been the principles contained in the more ancient decisions upon the legal effect and operation of contracts of a similar description, the strong leaning of the courts in more modern times has been to disincumber themselves from the fetters of technical rules and to give such a rational interpretation to the contract as will carry the intention of the parties into full and complete operation. In 8th Term Reports, 371, Grose, Justice, says: "The question is whether these covenants be dependent or independent and that must be collected from the apparent intention of the parties to the contract. There is certainly some confusion in the books on this subject, some of the older cases leaning to construe covenants of this sort to be independent, contrary to the real sense of the parties and the true justice of the case. But the later authorities convey more just sentiments and the case of Kingston v. Preston was the first strong authority in which they prevailed in operation to the former." Watchman v. Crook, 5 G. & J. (Md.) 255.

"usual and proper covenants" it often becomes indispensable to ascertain the meaning of these words. What in a particular case shall be regarded as a usual and proper covenant depends always upon the circumstances including the character of the premises leased and the use to which it is to be put by the lessee. A covenant on the part of the lessee to pay rent and a covenant on the part of the lessor to deliver and defend the lessee's possession of the premises would undoubtedly be usual covenants inasmuch as they are implied in every lease. A covenant by the lessee not to assign is not a usual covenant within the meaning of an agreement to execute a lease containing the usual covenants.²⁵ In England it has also been determined that a covenant by the lessee to pay all taxes is a usual and common covenant,²⁶ though the contrary would be the rule in the United States. But covenants restricting the tenant's use of the premises which are in restraint of trade are not at least in a locality where trade is carried on, usual or common covenants which a lessee is bound to have inserted in his lease.²⁷ Nor is a landlord entitled, as a matter of law, to have a proviso for a re-entry

²⁵ *Hampshire v. Wickens*, 47 L. J. Ch. 243, 7 Ch. Div. 555, 38 L. T. 408, 26 W. R. 491; *Buckland v. Papillon*, L. R. 1 Eq. 477, 12 Jur. (N. S.) 155, 36 L. J. Ch. 81, L. R. 2 Ch. 67, 12 Jur. (N. S.) 992, 15 L. T. 378, 15 W. R. 92; *Vere v. Lovenden*, 12 Ves. 179, 10 R. R. 77; *Jones v. Jones*, 10 R. R. 186; *Browne v. Raban*, 15 Ves. 528; *Ex parte Lucas*, 3 Deac. & C. 144, 1 Mont. & Ayr. 93; *Blacker v. Mathers*, 6 Bro. P. C. 334; *Henderson v. Hay*, 3 Bro. C. C. 632; *Lander v. Bagley's Contract*, 61 L. J. Ch. 707; (1892) 3 Ch. 41, 67 L. T. 521. *Contra*, *Morgan v. Slaughter*, 1 Esp. 8, 5 R. R. 715.

²⁶ *Bennett v. Womack*, 7 B. & C. 627, 1 M. & Ry. 644, 3 Car. & P. 96, 6 L. J. (O. S.) K. B. 175, 31 R. R. 270.

²⁷ *Wilbraham v. Livesy*. 18 Beav. 206, 2 W. R. 281; *Propert v. Parker*, 3 Mylne & K. 280; *Van*

v. Corpe, 3 Myl. & K. 269, 276, 6 L. J. Ch. 208, 1 Jur. 101, 149; *Hayward v. Parke*, 16 C. B. 295, 24 L. J. C. P. 217, 1 Jur. (N. S.) 781; *Doe d. Bute (Marquis) v. Guest*, 15 Mee. & W. 160. If an agreement for a lease contain no stipulation as to covenants the party agreeing to take the lease, has a right to a lease, containing only usual covenants, and a restriction against particular trades, not being a usual covenant cannot be introduced in the lease. *Propert v. Parker*, 3 My. & K. 280. In *Van v. Corpe*, 3 My. & K. 269, 276, the master of the rolls said: "I consider it to be perfectly clear that the common and usual covenants between landlord and tenant will not extend to covenants in restraint of trade and I consider that a provision against carrying on a school should not be extended."

upon a breach of any of the conditions or covenants by the lessee, inserted in the lease as a common and usual provision, except that a proviso for re-entry on nonpayment is usual and so may be insisted on by the landlord where a lease is to contain the usual covenants.²⁸ A power of re-entry in a lease, if the lessee or his assigns become bankrupt, or make a composition with creditors, or if execution should issue against either of them, is unusual, and an intended assignee is not bound to accept a lease containing such a covenant²⁹ where he has agreed to take an assignment of a lease containing only the usual covenants.³⁰

§ 383. *Whether covenants are joint or several.* The answer to the question whether covenants are to be considered as joint or several depends wholly upon the intention of the parties to be ascertained upon a construction of the express language of the covenant in connection with all the lease. Where it is apparent from all the lease that the interest of the parties to the covenant is joint the covenant will be treated as a joint covenant.³¹ On the other hand if the interest of the parties to the covenant is severable it does not follow that the covenant will be construed as a several covenant but it may be construed as joint or several

²⁸ *Hodgkinson v. Crowe*, 44 L. J. Ch. 680, L. R. 10 Ch. 622, 33 L. T. 388, 23 W. R. 885; *In re Anderton & Milner*, 59 L. J. Ch. 765, 45 Ch. Div. 476, 63 L. T. 332, 39 W. R. 44. As to power of entry on bankruptcy of the lessee. *Haines v. Burnett*, 27 Beav. 500, 29 L. J. Ch. 289, 5 Jur. (N. S.) 1279, 1 L. T. 18, 8 W. R. 130.

²⁹ *Hyde v. Warden*, 47 L. J. Ex. 121, 3 Ex. D. 72, 37 L. T. 567, 26 W. R. 201.

³⁰ "A clause for re-entry for non-payment of rent is always inserted without any opposition from anybody. It has never been disputed by any tenant because both at law and in equity the lessee can be relieved from the forfeiture by payment of the rent after the period of forfeiture has

arrived, just as a mortgagor can redeem his estate, though the time fixed by the mortgage deed for redemption has passed; so that the proviso only operates as a penalty. A clause of re-entry for breach of covenants generally, where, as there are no means of ascertaining the compensation a court of equity cannot relieve, stands on a different footing." *Hodgkinson v. Crowe*, 33 L. T. (N. S.) 288, L. R. 10 Ch. App. 622, quoted and approved in *Anderton and Milner's Contract*, 63 L. T. (N. S.) 334.

³¹ *Bradburne v. Botfield*, 14 Mee. & Wel. 559, 572; *Hopkinson v. Lee*, 6 Q. B. 964; *Foley v. Addenbrooke*, 4 Q. B. 197, 207; *Pugh v. Stringfield*, 3 Com. Bench, (N. S.) 2.

according to circumstances and the manifest interest of the parties. The tendency of the courts is to regard all covenants and contracts as several rather than as joint covenants or contracts. Unless it is very clear that the parties to the covenant in a lease meant that their liability under the covenant should be joint the court will be inclined to regard it as a several covenant. Nevertheless, if the covenant is expressly joint it will be so construed though it is apparent that the interests of the parties are several.³² The general rules of partnership liability apply to leases executed by a firm either as lessees or lessors. Thus, where a lease is executed by a firm composed of several members its covenants are both joint and several, and each member of the firm is liable individually thereon as well as jointly.³³ And in the case of an alleged breach of the covenant in a lease by joint obligors the act of either of them may be proved to show a breach of the covenant although the parties whose acts are proved have neither been served with the summons nor appeared in action.³⁴ Where the covenants and conditions in a lease are entire in their nature, embracing the whole premises which is included in the lease and by its term the covenants are expressly applicable to the premises as to one undivided parcel of land the mere severance of the land among two or more lessees as co-tenants and the receipt from each of such co-tenants for their convenience of the proportion of rent due from each will bring about no change in the scope and effect of covenants or conditions entered into by them. There is no severance in the case of entire covenants binding upon a lessee unless the title to the reversion or the right to receive the rents has been severed so as to be vested in several persons. If therefore a lessee assigns his term as to a portion of the premises it will be his duty to see to it that his assignee fulfills all conditions and covenants involving a forfeiture for if either assignor or assignee is guilty of any act which is a breach of condition the whole term is gone.³⁵

³² James v. Emery, 2 Moore, 195; Sorsbie v. Park, 12 Mee. & Wel. 146; Wilkinson v. Hull, 1 Bing. New Cases, 713; Harcourt v. Wyman, 3 Exch. 817; Foley v. Addenbrooke, 4 Q. B. 197; City of Philadelphia v. Reeves, 48 Pa. St. 472.

³³ Dunn v. Jeffery, 36 Kan. 408, 411, 13 Pac. Rep. 781.

³⁴ Edesheimer v. Quackenbush, 68 Hun, 427, 23 N. Y. Supp. 75.

³⁵ Clarke v. Cummings, 5 Barb. (N. Y.) 339, 356; Jackson v. Brousen, 7 Johns. (N. Y.) 227. The result of the cases appears to

§ 384. **Dependent and independent covenants.** The intention of the parties always determines whether covenants in a lease which are mutually made by the lessor and the lessee are dependent or independent. This must be determined by a reasonable construction of the lease. The courts usually lean to a construction which will make covenants in a lease independent rather than dependent, especially where some benefit has been received by the covenantor. A covenant which goes only to a part of the consideration on both sides, and a breach of which may be compensated by damages is usually accepted by the courts as an independent covenant. Where covenants are independent each party may sue on the covenant of the other without reference to whether he has or has not performed his own covenant. If covenants are dependent the performance by each party of his own covenant is a condition precedent to his right to recover on or to enforce the covenant of the other party. A covenant on the part of the lessor to repair or to make improvements is usually independent of the lessee's covenant to pay rent. So the covenant of the lessee to pay rent and of the lessor to board the lessee are likewise independent. But the covenant of the lessee to pay rent and of the lessor to give possession are dependent though, if a lessee enters into possession of a part of the premises, he will be considered to have waived the full performance of the covenant to give possession, and the lessor will be entitled to rent *pro rata*.³⁶ In determining whether

be this, that where the legal interest and cause of action of the covenantees are several, they should sue separately, though the covenant be joint in terms; but the several interest and the several ground of action must distinctly appear, as in the case of covenants to pay separate rents to tenants in common upon demises by them; as in the case from *Slingsby's Case*, 5 Rep. 18b, to the case of *Eccleston v. Clipsham*, 2 Saund. 115, where a man by indenture demised Blackacre to A. Whiteacre to B. and Greenacre

to C. and covenanted with them and each of them that he had good title each might maintain an action for his particular damage by a breach of that covenant. On the other hand, it appears from several cases, that if the cause of action be joint the action should be joint, though the interest be several." *Foley v. Addenbrooke*, 4 Q. B. 197, 208. See, also, *Coryton v. Litherbye*, 2 Saund. 115; *Martin v. Crompe*, 1 Ld. Ray. 340.

³⁶ *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 47, 74 S. W. Rep 1007.

covenants are independent or dependent, certain rules have been laid down to enable the courts to reach the intention and meaning of the parties, when the instrument in its terms is vague and obscure. Thus: (1.) If a day be appointed for the payment of money or a part of it, or for doing any other act, and the day is to happen or many happen, before the thing which is the consideration of the payment of the money or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy and did not intend to make the performance a condition precedent and so it is where no time is fixed for the performance of that which is the consideration of the money or other act. (2.) When a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be compensated or paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the complaint or declaration.³⁷

§ 385. **The enforcements of negative covenants.** Under a lease which provides that a lessor may re-enter if the lessee fails to perform or to observe any covenant which is to be performed by him the right to re-enter arises upon the breach of a negative covenant as well as upon the breach of an affirmative covenant. The act of the lessee in doing what he has covenanted not to do is a failure to perform his covenant; and he may be as much in default by doing something he has covenanted not to do as by failure to do something he has agreed to do. Thus a proviso for a forfeiture and a re-entry expressly declared upon the breach of any covenant to be performed is not restricted to breaches of affirmative covenants as for example the covenant to pay rent and taxes and the covenant to keep the premises in repair but is extended to negative covenants; as for example covenants restricting the purpose for which the premises may be used by the lessees and covenants prohibiting an assignment or underletting by the lessee without the consent of the lessor.³⁸ This rule or principle of construction has been often applied by the courts

³⁷ *Bryan v. Fisher*, 3 Blackf. J. K. B. 539 (1904), 1 K. B. 698, (Ind.) 316, 319. 90 Law T. 624, 52 Wkly. Rep. 615,

³⁸ *Harman v. Ainslie*, 73 Law 20 Times Law R. 359.

to covenants by the lessee not to assign or to sublet without the consent of the lessor;³⁹ to a covenant by the lessee not to use or occupy the demised premises for any unlawful purpose;⁴⁰ and to a covenant by the lessee not to charge or incumber the premises by mortgaging the same.⁴¹ Where either a lessor or a lessee covenants that he will not during the term do some particular thing a negative covenant is created which will be enforceable in equity by the covenantee according to the ordinary rules of equitable relief by an injunction. Thus it must appear that the covenantee will suffer irreparable injury by the breach of the negative covenant for which he is without a plain and adequate remedy at law. If by an action at law he can recover pecuniary damages for the breach of the covenant which will fully compensate him for the injury which he has received, equity will not interfere by an injunction to compel the performance of a negative covenant. And equity will not by injunction prevent the breach of a negative covenant unless the meaning of the covenant is explicit and the intention of the parties is clearly expressed in it.⁴² On the other hand if the covenantee has no adequate remedy at law and the breach of the negative covenant will work him a substantial injury an injunction will issue to prevent the expected breach of the negative covenant by the covenantor.⁴³

³⁹ *West Shore R. Co. v. Wenner*, 79 N. J. L. 233, 57 Atl. Rep. 408, affirmed in 60 Atl. Rep. 408.

⁴⁰ *Wheeler v. Earle*, 5 Cush. (Mass.) 31, 51 Am. Dec. 41.

⁴¹ *Croft v. Lumley*, 6 H. L. Cases, 672. See *contra* *Doe v. Stevens*, 3 B. & Ad. 299. A provision for a re-entry "in case the lessees shall fail in the observance or performance of any or either of the covenants and agreements on his or their parts," etc., applies only to a breach of an affirmative and not a negative covenant. *West v. Dobb*, 10 B. & S. 987, 39 L. J. Q. B. 190, L. R. 5 Q. B. 460, 23 L. T. 76, 18 W. R. 1167.

⁴² *Thruston v. Minke*, 32 Md. 487, 497; *Postal Telegraph Cable*

Co. v. Western Union Telegraph Co., 155 Ill. 335, 349, affirming 51 Ill. App. 62.

⁴³ In *Croft v. Lumley*, 6 H. L. C. 672, the covenant was that the lessee would not charge or incumber the premises by mortgage or granting any rent charges or by any other incumbrances whatever with a right of re-entry if the lessee should make default of or in the performance of any covenant which on his part are or ought to be performed, observed and kept. Nine judges being summoned to present their opinions to the house, one of the questions propounded to them was whether a breach of the covenant above mentioned gave the lessor a right

§ 386. **The liability of the parties to a covenant and of their assignee.** A distinction is made between the liability of a lessee on his personal covenant and the liability of his assignee on the same covenant. The lessee who has personally covenanted in his lease to do a certain thing for his lessor is bound to the lessor by privity of contract, as well as by privity of estate. He continues to be bound by privity of contract until the lease is terminated, surrendered or cancelled but he is only bound by privity of estate until he assigns the lease. The assignment destroys the privity of estate though he is still bound on his covenant and he may be sued by the lessor on his covenant at any time notwithstanding the assignment. But the assignee of a lease stands only in privity of estate to the lessor while he is in possession. Strictly speaking, the assignee cannot be sued by the lessor upon any covenant of the lease because there is no privity of contract between him and his lessor, but by one of these numerous fictions of law which have been invented in the course of centuries of judicial legislation to enable justice to be done between man and man an assignee while in possession is said to be liable on certain covenants which are stated "to run with the land." As a matter of fact he is not liable on the covenant at all. Any liability the assignee of the lessee may have, is only incumbent upon him because of the equitable principle that he who enjoys the benefits of an existing condition of affairs cannot shift its duties. After the assignment the assignee has the sole right of possession under the lease, and having this right, he must accept the accompanying duty or duties. The right of possession and the enjoyment of possession impose upon him the obligation to return their equivalent. Hence, he must do for the landlord everything that his assignor had agreed to do as an equivalent of the enjoyment of the premises.

to re-enter, and unanimously they answered in the affirmative. Mr. Baron Watson said: "It is a proper rule of construction that the subject and intent of the covenant must be looked at as well as the words used," and "the proviso for re-entry would apply to and embrace negative as well as positive covenants." Mr. Baron

Bramwell said: "Default in performance of covenants to be performed, observed and kept applied to covenants not to do some thing as well as to covenants to do something." Mr. Baron Martin said: "The abiding by a covenant is the performance of it; the non-abiding is a non-performance."

This class of covenants which are by a fiction said to run with the land comprise all those which involve the doing of something to or about the land itself. They are very numerous and include almost every conceivable covenant which can be inserted in a lease. It is not necessary where by its nature a covenant runs with the land that it shall contain the word "assignee" or "assigns." In the next section the topic of covenants which run with the land will be considered in detail.

§ 387. **Covenants running with the land.** Covenants are classified into real covenants and personal covenants. Real covenants are those which are annexed to the estate and which are incidents of its ownership and enjoyment irrespective of the fact that the original parties to the covenant are no longer in possession thereof. Such covenants are usually to be performed upon the land and are therefore said to run with the land. A personal covenant is one which in the absence of express language making it obligatory upon the assignees or grantees of the parties binds only those persons who are parties to it. In determining whether a covenant does or does not run with the land, it is important to ascertain whether the subject matter of the covenant was or was not in existence when the covenant was made. In some cases the fact of the non-existence of the subject matter may be controlling. Thus if the subject matter to be build a wall or a house on the land on a future day during the term it will be a personal covenant in the absence of an express agreement that the covenant shall run with the land.⁴⁴ This intent may most appropriately be shown by making the covenant binding upon the "assigns" of the parties in so many words or in any language which has an equivalent meaning. For the law does not require any particular form of words to constitute a covenant which shall run with the land.⁴⁵ Inasmuch therefore as

⁴⁴ *Thompson v. Rose*, 8 Cow. (N. Y.) 263.

⁴⁵ *Trill v. Eastman*, 3 Met. (Mass.) 121, 124; *Savage v. Mason*, 3 Cush. (Mass.) 500, 505; *Masury v. Southworth*, 9 Ohio St. 340, 352; *Williams v. Burrell*, 1 Com. Bench, 402, 430; *Great Nat. Ry. Co. v. Harrison*, 12 Com. Bench, 576, 609; *Bream v. Dickenson*, 2 Humph. (Tenn.) 126;

Hansen v. Meyer, 81 Ill. 321. If the covenant by reason of its character runs with the land the word "assigns" is not required in it. *Heidon v. Wright*, 6 Ohio Dec. 315, 4 Ohio N. P. Rep. 235; *Heidon v. Wright*, 60 Ohio St. 609, affirming *Wright v. Heidon*, 6 Ohio Dec. 151, 4 Ohio N. P. Rep. 124. In *Spencer's Case*, 5 Coke, 16b, which is a leading case upon cove-

the subject matter and general purpose of the covenant rather than its form and language determine whether or not the covenant does or does not run with the land we may instance certain covenants which have been held to run with the land. Covenants to pay rent,⁴⁰ to repair,⁴⁷ to renew by the lessor,⁴⁸ a covenant by

nants which run with the land, it was said: "Where the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by the force of the covenant is *quo dammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but where the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quo dammodo* annexed, or appurtenant to the house, and shall bind the assignee, although he be not bound expressly by the covenant; but in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex a covenant to a thing which has no being." * * * "If the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the land demised, that forasmuch as it is to be done upon the land demised that it should bind the assignee; for although the covenant doth extend to a thing to be newly

made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore it shall bind the assignee by expres words. * * * But although the covenant be for him and his assigns yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged."

⁴⁰ *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. Rep. 104, 106; *Webster v. Nichols*, 104 Ill. 160; *Saxton v. Storage Co.*, 129 Ill. 318, 21 N. E. Rep. 920; *Carley v. Lewis*, 24 Ind. 23; *Trask v. Graham*, 47 Minn. 571, 50 N. W. Rep. 917; *Smith v. Harrison*, 42 Ohio St. 180; *Bradford Oil Co. v. Blair*, 113 Pa. St. 83, 4 Atl. Rep. 218, 57 Am. Rep. 442; *Fennell v. Guffey*, 139 Pa. St. 341, 20 Atl. Rep. 1048; *Shaw v. Partridge*, 17 Vt. 626.

⁴⁷ *Hayes v. New York Gold Mining Co.*, 2 Colo. 273; *Harris v. Goslin*, 3 Harr. (Del.) 338; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Meyers v. Burns*, 33 Barb. (N. Y.) 401; *Lehmaier v. Jones*, 91 N. Y. Supp. 687; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Allen v. Culver*, 3 Denio (N. Y.) 284; *Shelby v. Herne*, 6 Yerg. (Tenn.) 513, 514; *Pollard v. Shaafer*, 1 Dall. (Pa.) 210, 1 Am. Rep. 239, 1 Law. ed. 104; *Spencer's Case*, 5 Coke, 17b.

⁴⁸ *Callan v. McDaniel*, 72 Ala. 96; *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Dec. 560; *Eichhorn v. Peterson*, 16 Ill. App. 601;

the lessee to surrender with all improvements,⁴⁹ and in tenantable condition,⁵⁰ by the lessee to pay taxes.⁵¹ or to pay all charges and expenses except taxes,⁵² covenants by the lessee restricting him to a particular use of the premises.⁵³ by a lessor not to lease a portion of the premises for a purpose which will compete with the business of the lessee,⁵⁴ by a lessor to pay for improvements made by the lessee,⁵⁵ by a lessee not to sell any goods on the premises except those purchased of the lessor,⁵⁶ by a lessee to vacate on thirty days notice,⁵⁷ by the lessee covenant to build houses on the land,⁵⁸ run with the land. A stipulation by which the lessor, a corporation, reserved the right to terminate the lease at any time it might sell the

Massy v. Mead, 2 La. 157; McGlin-tock v. Joyner, 77 Miss. 678, 27 So. Rep. 837; Blackmore v. Boardman, 28 Mo. 420; Wilkinson v. Pettit, 47 Barb. (N. Y.) 230; Piggot v. Mason, 1 Paige Ch. (N. Y.) 412, 414; Downing v. Jones, 11 Daly (N. Y.) 245; Barclay v. Steamboat Co., 6 Phila. 558; Roe v. Hayley, 12 East, 469; Brooke v. Buckley, 2 Ves. Jr. 498.

⁴⁹ Coburn v. Goodall, 72 Cal. 498, 14 Pac. Rep. 190, 1 Am. St. Rep. 75; Allen v. Culver, 3 Denio (N. Y.) 284.

⁵⁰ Shelby v. Hearn, 6 Yerg. (Tenn.) 512; Strode v. Seaton, 2 C. M. & R. 730; Demarest v. Willard, 8 Cow. (N. Y.) 206; Myers v. Burns, 33 Barb. (N. Y.) 401; Harris v. Goslin, 3 Harr. (Del.) 340; Payne v. Haine, 16 M. & W. 541.

⁵¹ Salisbury v. Shirley, 66 Cal. 223, 5 Pac. Rep. 104, 106; Ellis v. Bardbury, 75 Cal. 234; Worthington v. Cook, 52 Ind. 394; Trask v. Graham, 47 Minn. 571, 50 N. W. Rep. 917; Post v. Kearney, 2 N. Y. 394; Borgman v. Spellmire, 4 Ohio N. P. 416, 7 Ohio Dec. 344, 347; Sutliff v. Atwood, 15 Ohio St. 186; West Virginia, etc., Co. v.

McIntire, 44 W. Va. 210, 28 S. E. Rep. 696.

⁵² Torrey v. Wallace, 3 Cush. (Mass.) 442.

⁵³ Wheeler v. Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41; De Forest v. Byrne, 1 Hilton (N. Y.) 43; Trustees v. Cowen, 4 Paige (N. Y.) 510; Spencer v. Stevens, 18 Misc. Rep. 112, 41 N. Y. Supp. 39; Wright v. Heidorn, 6 Ohio Dec. 151, 4 Ohio N. P. (N. S.) 124; Granite Building Corp. v. Greene, 25 R. I. 586, 57 Atl. Rep. 649; Cockson v. Cock, Cro. Jac. 125.

⁵⁴ Postal Telegraph Cable Co. v. Western Union Telegraph Co., 155 Ill. 335, 40 N. E. Rep. 587; Norman v. Wells, 17 Wend. (N. Y.) 136.

⁵⁵ Coatsworth v. Schoellkopf, 75 N. Y. Supp. 753; Hollywood v. First Parish in Brockton, 192 Mass. 269, 78 N. E. Rep. 124; Frederick v. Callahan, 40 Iowa, 311; Stockett v. Howard, 34 Md. 121.

⁵⁶ White v. Southard Hotel Co. (1897), 1 Ch. 767.

⁵⁷ Hadley v. Berners, 97 Mo. App. 314, 71 S. W. Rep. 451.

⁵⁸ Garnhart v. Finney, 40 Mo. 449.

property by giving sixty days notice of the sale constitutes a covenant running with the land and authorizes its grantee to so terminate the lease though the word assigns shall not be in the stipulation.⁵⁹ So, also a covenant by the lessor to supply water,⁶⁰ or a covenant by the lessee and his executors and assigns not to assign without the written consent of the lessor,⁶¹ or by the lessee to yield up in good repair,⁶² or a covenant by a lessee to reside on the premises,⁶³ or to use the house as a dwelling house only,⁶⁴ runs with the land. Covenants in a lease to raise a dam to a certain height, and keep it and a farm in good repair, and to supply a certain quantity of water to the tenant, run with the land.⁶⁵ A covenant on the part of the lessor to sell and convey the property to the lessee runs with the land.⁶⁶ Where a covenant runs with the reversion any person who takes the reversion must take it with the burden of the covenant. The covenant is as it were a charge upon the reversion so that where the land is specifically devised by the lessor the devisee is liable for the performance of a covenant which runs with the land. But where the covenant does not run with the land as for example, where it is a personal agreement on the part of the landlord to do something as a preparation to the occupancy of the land by the tenant the performance of such a covenant is not binding on the devisee but must be attended to by the executor. If the covenant was an incident to the relation of the landlord and tenant so that it might be said to run with the land, the devisee must perform it; but if the covenant is a mere personal covenant of the lessor it is more properly performed by his executor and the damages if any are recovered against the executor should first be paid out of the testator's personal property.⁶⁷ A

⁵⁹ *McClung v. McPherson*, 47 Oreg. 731, 81 Pac. Rep. 567.

⁶⁰ *Jourdain v. Wilson*, 4 B. & Ald. 266, 23 R. R. 268.

⁶¹ *Williams v. Earle*, 9 B. & S. 740, 37 L. J. Q. B. 231, L. R. 3 Q. B. 739, 19 L. T. 238, 16 W. R. 1041.

⁶² *Martyn v. Clue*, 18 Q. B. 661, 22 L. J. Q. B. 147.

⁶³ *Tatem v. Chaplin*, 2 H. Bl. 133, 3 R. R. 360.

⁶⁴ *Wilkinson v. Rogers*, 10 Jur.

(N. S.) 5, 9 L. T. 434, 12 W. R. 119.

⁶⁵ *Noonan v. Orton*, 27 Wis. 300; *Noonan v. Orton*, 4 Wis. 335; *Noonan v. Orton*, 21 Wis. 283; *Noonan v. Orton*, 31 Wis. 265; *Orton v. Noonan*, 27 Wis. 272.

⁶⁶ *Maughtin v. Perry*, 85 Md. 352.

⁶⁷ *Eccles v. Mills*, 67 L. J. P. C. 25; (1898) A. C. 360, 78 L. T. 206, 46 W. R. 398. "The covenant

covenant for quiet enjoyment by the lessee runs with the land and may be enforced by an assignee of an assignor of the lessee who has covenanted for quiet enjoyment with the first assignee.⁶⁸

must run with the land—must be so connected with, be attached to, and inhere in the land, that the assignee of the reversion or the assignee of the lease, as the case may be, would have a right to the advantage of it, or be bound to perform it. Such is the general principle; but whether a covenant, so runs with the land, must depend, in the first place, upon the nature and character of the particular covenant and of the estate demised, so connected with the respective rights of lessor and lessee in reference to the subject matter of the covenant; and, in the next place, upon the intent of the parties in the creation of the estate, as shown by the language of the instrument creating it, construed with reference to the relative position of the parties and to the subject-matter to which their contract and conveyance is to be applied. The nature and character of the covenant may be such that it may run with the land; and yet, if it be clearly the agreement of the parties that it shall not so run, it would not be annexed, in despite of the agreement so expressed. And, on the contrary, however, clearly and strongly expressed may be the intent and agreement of the parties, that the covenant shall run with the land, yet if it be of such a character that the law does not permit it to be attached it cannot be attached by the agreement of the parties and the assignee would take the estate clear of any such covenant." By the court in *Mas-*

ury v. Southworth, 9 Ohio St. 340, 348. "As the law discourages perpetuities, it does not favor covenants for continued renewals; but, when they are clearly made, their binding obligation is recognized and will be enforced. The covenant for renewal is only an incident to the lease, and as it cannot be passed without the principal, the conveyance of the principal by a proper description will necessarily carry the incident. They are inseparable and a right of action cannot exist in favor of a person claiming the benefit of the covenant without any right to the possession of the leasehold; but the covenant being annexed to the estate runs with it, and cannot be retained by itself or assigned or severed so as to give an independent cause of action. A sale of the lease under execution will pass to the purchaser all the covenants that run with it as effectually as if he had received a conveyance from the lessee; for, as the purchaser, after he acquires possession, is bound to pay the rent, and in that way assumes the burdens of the lease, he has the right to take advantage of the covenants that touch and concern the thing demised, which enhance the value of the estate." By the court, *Richardson, J.*, in *Blackmore v. Boardman*, 28 Mo. 420, on page 426.

⁶⁸ *Lewis v. Campbell*, 8 Taunt. 715, 3 Moore, 35, R. R. 516, following *Noke v. Awder*, Cro. Eliz. 373, 426.

§ 388. The liability of the personal representatives of the covenantor. Where the covenant is not expressly made obligatory on the personal representatives of the parties to a lease it will be presumed that they are bound. The presumption always is that a person in contracting means to bind his personal representatives in case of his death prior to performance, unless the contract actually calls for the doing of something which involves some personal quality or characteristic which the covenantor alone possesses as would be the case where the deceased party had agreed to write a book or to paint a picture. It is obvious that the covenants usually contained in a lease are not usually embraced within the exception. This presumption may be excluded by the language of the contract even in ordinary cases where an adequate performance may be made by the representative. Thus if one purchase land or contract to erect a house on land of another person and shall die before the contract is performed his executor or administrator may be compelled to buy the land or furnish the house.⁶⁹ Hence from this it follows that a covenant by the lessor to rebuild in case the premises which were demised shall be destroyed by fire or other unavoidable casualty is binding on his executor or administrator although personal representatives are not mentioned in it,⁷⁰ and though the testator and lessor had devised the premises to other persons in his will. If the devisee shall refuse to permit the buildings to be rebuilt the estate is liable in damages for it is the act of the testator in devising the premises which prevents the executor from performing the covenant to rebuild. And the covenant to rebuild is still enforceable against the executor though the land descends to the heir and if the heir refuses to fulfill the covenant on which he is liable inasmuch as it runs with the land, the executor is still liable as such but never personally and must pay damages for breach of the covenant only to the extent that he has assets of the estate.

§ 389. Covenants and conditions distinguished. In the construction and interpretation of written leases the inclination of the courts is generally to construe an ambiguous stipulation whose character is doubtful as a covenant rather than as a condi-

⁶⁹ *Tilney v. Norris*, 1 Ld. Raym. 553; *Quick v. Ludborrow*, 3 Bulst. 3.

⁷⁰ *Chamberlin v. Dunlop*, 126 N. Y. 4, 26 N. E. Rep. 966, affirming 8 N. Y. Supp. 125.

tion. A clause in a lease will not be regarded as a condition if it can legitimately be construed as a covenant. If the intention of the parties to create a condition is not evidenced by apt words the court may treat the stipulation as a covenant.⁷¹ But the intention of the parties whatever it may be when it is ascertained will always control and where the intention is clear the stipulation or provision though in form it shall be a covenant, must be taken to be a condition if that was apparently the intention of the parties. Thus generally if there is a power of entry reserved to the lessor for the breach of any particular covenant or upon the breach of any and all covenants of the lease the clause though in form it is a covenant will be regarded as a condition and enforced accordingly.⁷² So where there is no provision for a forfeiture, or for a termination of the lease and re-entry upon the non-payment of rent the payment of rent is a condition the breach of which will operate as a forfeiture.⁷³ The landlord may under such circumstances either enforce a forfeiture or permit the tenant to remain in possession and recover the rent due in an action on the covenant to pay rent. For a stipulation in a lease may be a covenant in express terms as well as a condition and available to the landlord as both. If one make a lease for years by an indenture, provided always it is covenanted and agreed between the parties that the lessee shall not alien, this is both a covenant and a condition.⁷⁴ So a demise provided always that the tenant pays rent or does not assign which the tenant also expressly covenants and agrees to do is both a condition and a covenant.⁷⁵ The importance of the distinction between a cove-

⁷¹ *Vanatta v. Brewer*, 32 N. J. Eq. 268, 270; *Gould v. Bugbee*, 6 Gray (Mass.) 371, 375.

⁷² *Kew v. Trainor*, 50 Ill. App. 629, affirmed in 150 Ill. 150, 37 N. E. Rep. 22; *Wheeler v. Dascomb*, 3 Cush. (Mass.) 285, 289; *Vanatta v. Brewer*, 32 N. J. Eq. 268, 270.

⁷³ *Beal v. Bass*, 86 Me. 325, 29 Atl. Rep. 1088. But compare *Crandall v. Sorg*, 99 Ill. App. 22.

⁷⁴ *Verplanck v. Wright*, 23 Wend. (N. Y.) 506, 509. "These presents are upon condition" that the lessee shall do an act speci-

fied, create a lease upon condition on breach of which lessor may enter. *Jackson v. Allen*, 3 Cow. (N. Y.) 220.

⁷⁵ *Harrington v. Wise*, Cro. Eliz. 486; *Doe d. Henniker v. Watt*, 8 B. & C. 308, 315, 1 M. & Ry. 694, 6 L. J. (O. S.) K. B. 185. "A condition subsequent is a contingency named on the happening of which a grant may be defeated, such as the failure to pay money, erect buildings, or do any other required act, a failure to do which authorizes the grantor's re-entry.

nant and a condition lies in the rule that a breach of a covenant in a lease in the absence of a stipulation that a breach shall have such an effect does not work a forfeiture or determine the term. For where a term is created by a lease in express words it cannot be shortened or defeated except by words as strong and express as those by which it has been created.⁷⁶ So the fact that a lease provides for a forfeiture on the breach of certain covenants by

A conditional limitation, an example of which is a grant to one so long as he occupies the premises, or to a widow during widowhood differs from it only in form, and the fact that re-entry is not necessary to terminate the grant. The law regards conditions with the same disfavor it does forfeiture; and for similar reasons. A clause will not therefore be treated as a condition if it can be construed as a covenant without violence to its terms. If the purpose to create a condition is in unequivocal language as the courts have frequently said in 'apt terms,' such as 'upon condition,' 'provide nevertheless,' 'so long as,' 'during,' etc., the clause will be treated as a covenant simply. The provision under consideration does not contain such language. The terms, 'this lease shall not be sold, assigned, or transferred, without the written consent of the party of the first part,' conveyed no suggestion even that the lease may be lost by such transfer. They express simply an agreement by the lessee, who alone could make the transfer, that he will not do it. If the lessor was not satisfied with the remedy which the law affords for breaches of such agreements he should have stipulated for another by adding terms of condition or forfeiture. That he knew very well

how to do this, and had it in mind, as respects breaches of other provisions of the lease, is shown by the following clause: 'A failure to pay the money after demand made, or put down the well as hereinafter stipulated, shall forfeit this lease within one year from the date hereof.' The inference is strong, therefore, that he did not contemplate similar consequences as the result of a transfer." *Hague v. Ahrens*, 53 Fed. Rep. 58, page 60.

⁷⁶ *Vanatta v. Brewer*, 32 N. J. Eq. 269, 270; *Phillips v. Tucker*, 3 Ind. 132, 135; *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. Rep. 843; *Gould v. Bugbee*, 6 Gray (Mass.) 371, 375; *Beal v. Bass*, 86 Me. 325, 29 Atl. Rep. 1088; *Wilson v. Phillips*, 2 Bing. 13; *Rudd v. Golding*, 6 Mov. 231; *Darke v. Bowditch*, 8 Q. B. 973, 978; *Raines v. Keller*, 4 C. & P. 3. The words in an agreement for a lease: "The said tenant hereby agrees that he will not underlet the said premises without the consent in writing of the landlord," do not create a condition. But a provision that it is "stipulated and conditioned" that the tenant shall not assign, creates a condition for the breach of which a lessor may re-enter. *Doe d. Henniker v. Wall*, 8 B. & C. 308. 1 M. & R. 694.

the lessee but omits to provide for a forfeiture upon the breach of other agreement raises a very strong presumption that the agreements for which no forfeiture is provided are covenants and not conditions. Thus where the lease contains a covenant not to assign and an express provision for forfeiture upon the breach of certain other covenants contained in the lease is almost conclusive that the provision forbidding an assignment without the consent of the lessor was a covenant and not a condition and there will therefore exist no right of re-entry in the lessor upon the lessee's breach of this agreement not to assign.⁷⁷ A stipulation that a tenant shall surrender the premises whenever some certain event therein described shall happen or a certain contingency shall arise, is not a condition which upon re-entry terminates the lease unless a forfeiture is in terms provided. It is a covenant whose breach does not terminate the lease but only gives to the lessor an action for damages against the lessee for the breach of the covenant.⁷⁸ The landlord can-

⁷⁷ Doe v. Gordon, 4 M. & S. 265; Crawley v. Price, L. R. 10 Q. B. 302; Shaw v. Coffin, 14 C. B. (N. S.) 372; Den v. Post, 25 N. J. Law, 285; Spear v. Fuller, 8 N. H. 174; Wheeler v. Dascomb, 3 Cush. (Mass.) 295; Harris v. Oil Co., 57 Ohio St. 118, 48 N. E. Rep. 502. "In my judgment, in order to work a forfeiture of property, the acts which are to effect the forfeiture or affect the property should be expressed in language so clear, express and intelligible, as to leave no room or reason for doubt in the mind of the judge who is called upon to decide the question, that the act in question does, according to a fair and reasonable construction of the language used and the understanding and intelligence of the parties to the contract, amount to a forfeiture. Indeed, as has been justly observed by the learned counsel for the defendant, it would be highly inconvenient and unjust

that persons who may have invested, it may be, their whole fortune, in taking and setting up a public house, should by reason of the uncertainty or ambiguity of the language of the lease be kept in perpetual dread of the risk of a forfeiture which might be their ruin." By Kelly, C. B., in Wooler v. Knott, 45 L. J. Ex. 313, 1 Ex. D. 124, 34 L. T. 362, 24 W. R. 615, affirmed in 45 L. J. Ex. 884, 1 Ex. D. 265, 35 L. T. 121, 24 W. R. 1004, where a lease contained a proviso for re-entry if the lessee of a public house should do or suffer to be done any act which might affect or lessen or make void either or any of the licenses.

⁷⁸ Bergland v. Frawley, 72 Wis. 559, 562, 40 N. W. Rep. 372, 373. See, also, Dennison v. Read, 3 Dana (Ky.) 586; Kew v. Trainor, 150 Ill. 150, 155, 37 N. E. Rep. 223, affirming 50 Ill. App. 629; Chipman v. Emeric, 5 Cal. 49, 63 Am. Dec. 80; In re Pennewell, 119 Fed.

not on a breach of such an agreement enter and expel the tenant as for a forfeiture. So an agreement by which a lessee, on the request of the lessor is to surrender any part of the demised premises and, in consideration for this the lessor agrees to make a proportional abatement of the rent is a covenant and not a condition. Here something is to be done by both parties for the breach of which either may recover damages but unless there be an express provision for a forfeiture the term still continues, after the covenant shall have been broken.⁷⁹ So, too, as a general rule a stipulation by the lessee that he will in consideration of a sum of money to be paid by the lessor vacate the premises on the sale of the same by the lessor and upon the demand of the latter is not a condition or limitation, where there is no forfeiture expressly and in terms provided for a failure to quit and the lessor has therefore no right of re-entry⁸⁰ upon the refusal of the lessee to surrender possession but can only recover damages after he has demanded possession. A provision by which the lessor received the right to sell the demised premises at any time during the term and the lessee in consideration of such sale agrees for himself and his heirs to surrender and deliver possession at once to the lessor and release any further claim on the demised premises means that a sale was to terminate the lease *ipso facto*.⁸¹

§ 390. Whether conditions are subsequent or precedent. The determination of a condition in a lease as subsequent or pre-

Rep. 139; Hague v. Ahrens, 53 Fed. Rep. 58, 61, 3 C. C. A. 426, 3 U. S. App. 231.

⁷⁹ Wheeler v. Dascomb, 3 Cush. (Mass.) 285, 289; Wilson v. Phillips, 2 Bing. 13. See, also, Vanatta v. Dascomb, 32 N. J. Eq. 268, 271.

⁸⁰ Sloan v. Cantwell, 5 Cold. (Tenn.) 571, 577; Dennison v. Read, 3 Dana (Ky.) 586; Bergland v. Frawley, 72 Wis. 559, 561, 40 N. W. Rep. 372, 1 Washb. R. Pro. Ch. 10, sec. 3, cl. 8.

⁸¹ Baxter v. City of Providence (R. I.), 40 Atl. Rep. 423. The court said: "The objection is that it is not mutual in its terms.

I do not think this is so. The lessor reserves the right to sell and the lessee agrees to surrender possession at once upon sale. The lessee could not be compelled by a new owner to hold it against his agreement and if the occupation continues after the sale, it would be by virtue of a new agreement between the parties and not by virtue of the lease. The parties must have meant that a sale, *ipso facto*, was to terminate the lease, and the lessor's covenant signified his assent to this; otherwise no adequate force can be given to it."

cedent depends wholly on the intention of the parties. This intention is to be ascertained from the express language of the condition as contained in the lease itself, construed with the other portions of the lease, and in the light of the facts and circumstances of the case particular significance being attached to the use of the building, the length of the term, and the way in which the rent is payable.⁸² Where the construction is doubtful the condition will be construed to be a condition subsequent rather than a condition precedent. Subject to these rules it may be said that if the act on the part of lessee does not necessarily precede the vesting of the lease in him, but may accompany it, or follow it, or may be done after the vesting with the same effect as before the vesting, the condition is subsequent and not precedent. Hence, where a term is created by express words and the lessee is required in the lease to do something in reference to the premises the condition is a condition subsequent. The creation of a fixed term which is to begin on a date named in the lease raises a presumption that the doing of the act by the lessee which is made a condition shall be performed subsequently to the vesting. And the presumption that a condition contained in the lease is a condition subsequent is greatly strengthened by the fact that there is a clause of forfeiture in the lease for if the interest is not vested in the lessee and was not to vest in him until he performed the condition then the clause of forfeiture would be unnecessary and useless.⁸³

⁸² *Frank v. Stratford-Handcock*, 13 *Wyom.* 37, 77 *Pac. Rep.* 134.

⁸³ In *South Congregational Meeting House, etc., v. Hilton*, 11 *Gray (Mass.)* 407, a condition that a lessee should build a new front to the premises with glass of a specified quality, was held not to be a condition precedent to the vesting of the term in the lessee upon the following considerations. The words "do lease, demise and let" import a term to begin presently, not in the future on a contingency. This term was fixed and was to begin on a date specified subsequent to the date of the

lease. No day was named when the rent was to be paid so that presumptively it would begin to run from the date of the lease. The time within which the lessee would have to do the thing he agreed to do is not fixed so that he would have a reasonable time to perform it. A compliance with the condition may extend beyond the time beyond the day he would have to pay rent. The act to be done implies of necessity that the lessee is to be in exclusive possession and control of the premises when he fulfills the condition, and it is unreasonable to suppose

§ 391. **The construction of a provision for a forfeiture.** A clause in the lease providing for a re-entry upon the breach of any covenant in the lease will be strictly construed in favor of the tenant.⁸⁴ Unless the intention of the parties is reasonably clear upon the language of the lease that a provision for a forfeiture upon a breach of covenant was intended, the clause will not be given that effect. Nothing will be implied in this regard for the purpose of raising a provision for a forfeiture. The court will presume, in the absence of clear language to the contrary, that the parties did not mean to create a forfeiture for breaches of covenant in the lease. Where there may reasonably be two constructions placed upon the language employed in the lease, the court will prefer the construction which avoids the creation of a forfeiture. An illustration of this may be found in a case where it was held that a provision for re-entry on the commission of waste to an amount specified meant waste producing an injury to the reversion and unless it appears that the reversion was injured to that amount there is no forfeiture.⁸⁵ A proviso that a lessor may re-enter if the tenant shall make default in the performance of any covenants for thirty days after notice is applicable to affirmative covenants. Thus, it cannot be assumed that the landlord was to give the tenant thirty days' notice not to do a certain act or number of acts which would be a breach of negative covenants. Thus, if the

a party would enter into a condition precedent by which after making extensive repairs he might by a slight omission lose all he had put into the building. The insertion of a clause of forfeiture seems to imply that the term must vest, for forfeitures implies the taking away or loss of something in possession. Hence the lessor was held bound to show an entry for a breach of condition before he could maintain an action to recover the premises. In construing a lease in *Porter v. Sheppard*, 6 T. R. 665, 3 R. R. 305, Lord Kenyon said: "It has frequently been said, and common sense seems to justify it, that conditions are to

be construed to be either precedent or subsequent, according to the fair intention of the parties to be collected from the instrument, and that technical words (if there be any to encounter such intention, and there are none in this case), should give way to that intention." Approved in *Roberts v. Brett*, 11 H. L. Cases, 354.

⁸⁴ *Doe d. Polk v. Marchetti*, 1 B. & A. 715, 720, 9 L. J. (O. S.) K. B. 126; *Toleman v. Portbury*, 39 L. J. Q. B. 136, L. R. 5 Q. B. 288, 22 L. T. 33, 18 W. R. 579.

⁸⁵ *Doe d. Darlington v. Bond*, 5 B. & C. 855, 8 D. & R. 738, 5 L. J. (O. S.) 68, 29 R. R. 436.

tenant has covenanted not to build, or not to make alterations in the premises, it can hardly be reasonably conceived that he can escape the forfeiture arising from his breach of such a covenant merely because his landlord has not given him thirty days' notice not to raise or lower the walls, or not to vary the original plan of the premises or not to permit new buildings to be erected or not to allow openings or windows to be made. To require notice in such case would be to require the landlord to give the tenant a continuous series of notices. It is very different where the tenant is to do something as to repair or pay money and not merely to refrain from doing something. In such case a notice may be reasonably required both to secure the performance of the act by the tenant within a reasonable time and also to benefit him by giving him a short time in which to perform.⁸⁶ A proviso for re-entry in case the lessee shall not well and truly perform and keep all covenants, conditions and agreements, is wide enough to include negative as well as affirmative covenants as for example, a covenant not to carry on a particular trade or business on the premises or not to assign or sublet without the written consent of the lessor.⁸⁷

⁸⁶ Doe d. Polk v. Marchetti, 1 B. & Ad. 715, 9 L. J. (O. S.) K. B. 126.

⁸⁷ Timms v. Baker, 49 L. T. 106. See, also, Croft v. Lumley, 6 H. L. Cas. 672, 27 L. J. Q. B. 321, 4 Jur. (N. S.) 903, 6 W. R. 523. "A party who demises land by an instrument not under seal may introduce a condition into it, provided he use apt and appropriate words for that purpose. The words 'provided always,' *sub conditione, ita quod*, used in a conveyance of real estate by themselves make the conveyance conditional. But, in a lease for years, no precise form of words is necessary to make a condition. It is sufficient if it appear that the words used were intended to have the effect of creating a condition. They must be words of the landlord for he must impose the con-

dition. Here, first, the agreement purports to be in consideration of the rent and conditions therein-after mentioned; and then the words 'it is stipulated' occur more than once: and then in the last sentence of the instrument come the words 'it is lastly stipulated and conditioned that the tenant shall not assign, transfer, underlet, or part with any part of the lands, otherwise than to his wife and children.' These words are clearly introduced into the instrument on the part of the lessor for they are for his benefit. The word 'conditioned' is fairly a word of condition. It is said that the word 'stipulated' and the word 'conditioned,' being used together have the same meaning and import a covenant and not a condition; but there are several authorities which show that, if words both of

§ 392. The enforcement of a forfeiture after a tenant has become a vendee. Where a tenant has an option to purchase the demised premises, it may become necessary to determine whether a forfeiture taking place before he has exercised his option to buy may be thereafter enforced by the landlord. If the performance of all conditions and covenants by the tenant was a condition precedent to his valid exercise of the option by him the forfeiture may thereafter be enforced particularly if the landlord was ignorant of the fact of forfeiture when the option to purchase was exercised by the tenant. But where this is not the case or where the landlord has acquiesced in the exercise of the option by language or conduct amounting to an estoppel a different question arises. A tenant who has an option to purchase the demised premises after he has exercised his option by giving the landlord a proper notice or by some other unequivocal act which is brought to the knowledge of his landlord is in a vastly different position as regards his landlord from what he was before he exercised his option. He is then a vendee in possession and his former landlord has become the vendor. The former tenant in his new capacity of vendee is in equity the real owner though the legal title to the fee is still in the landlord. The vendor or former landlord is regarded in equity as a trustee for his former tenant, the present vendee. Of course the vendor is not a mere dormant trustee but one having a very substantial and personal interest in the property with a right to protect this interest. His right, however, is not an absolute right such as he had when he was a landlord, but a limited right as a vendor. He can protect his rights as a vendor but he may not, in so doing, encroach upon any of the rights of his former tenant as a vendee. He can do nothing either as a landlord or as a vendor which will destroy any rights which the former tenant has acquired by becoming a vendee. He cannot, for example, after the tenant has become a vendee, enforce a forfeiture which he might have enforced while the tenant was such, particularly if the performance of the condition on which the

covenant and condition are used in the same instrument, they both shall operate. If the word 'stipulated' import a covenant, it will operate as such; and if the word

'conditioned' import a condition. it must also operate." By Bayley, J., in *Doe d. Henniker v. Wall*, 8 B. & C. 308, 1 M. & R. 694.

forfeiture is based was not a condition precedent to the exercise of the option to purchase.⁸⁸

§ 393. **The necessity for a notice of a forfeiture.** If the lease requires that a notice of forfeiture shall be given by the lessor prior to re-entry for a breach of covenant an entry without the notice may be invalid. If nothing is said in the lease as to the necessity of a written notice of forfeiture the mere act of taking possession is all the notice which is required.⁸⁹ If notice be required and the lessors are tenants in common, all must give notice. A notice of forfeiture by one will only effect his share.⁹⁰ The rule would likely be otherwise with joint tenants where notice by one would be sufficient to bind all. If the lessees are tenants in common apparently upon general principles, all ought to be notified of a forfeiture. But where they hold jointly notice to one is notice to all. Where an English statute required that a landlord must notify his tenant of the breach of a condition or covenant under which the landlord claims a forfeiture, it was held that notice of forfeiture based on breach of a covenant to repair must specify all the particulars in which the repairs are required and must point out to the tenant exactly what he will have to do in order to fulfill his covenant.⁹¹ So, also, a notice which gives in detail a list of repairs which may be required according to the condition of each house where the same may be necessary, and which does not tell the tenant precisely what repairs are to be done, but tells him what may have to be done leaving it for the tenant to ascertain which of the several houses comprised in the lease and in what part of each house the repairs are necessary, is sufficient.⁹²

⁸⁸ *Rafferty v. Schofield*, 66 L. J. Ch. 448; (1897) 1 Ch. 937, 76 L. T. 648, 45 W. R. 460, citing *Shaw v. Foster*, 27 L. T. 281, L. R. 5 H. L. 321. In this case the tenant was in default on a covenant or condition when he exercised his option to purchase.

⁸⁹ *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248, 257, 71 S. W. Rep. 696.

⁹⁰ *Updegraff v. Lesem* (Colo. App. 1900), 62 Pac. Rep. 342.

⁹¹ *Fletcher v. Nokes*, 76 L. T. Rep. 107; (1897) 1 Ch. 271; *Re Serle*, 78 L. T. Rep. 384; (1898) 1 Ch. 652. The court says that the tenant must have full notice of what he is required to do. *Renton v. Barnett*, 77 L. T. Rep. 645; (1898) 1 Q. B. 276.

⁹² *Matthews v. Usher*, 68 L. J. Q. B. 988, 81 L. T. 542.

§ 394. **The effect of a forfeiture upon the lease.** The mere forfeiture of a lease by the default of a tenant to perform a covenant or condition of the lease has no effect alone upon the lease except to give the lessor a right to enter for the default. Indeed, it may be said that the breach of a condition of a lease by the lessee does not work a forfeiture without some act on the part of the lessor claiming it.⁹³ But the entry of the landlord upon the premises with the intention of taking possession for a breach of condition or of a covenant terminates the lease. At the common law by an entry after condition broken, the lease is put an end to. The lessor is then in possession as of his former estate. His entry is the equivalent of a surrender and he cannot thereafter collect the rent subsequently accruing.⁹⁴ Rent as such will no longer accrue under the lease. The liability of the lessee to pay rent rests solely upon his covenant to pay and as the relationship of landlord and tenant is extinguished by the re-entry of the landlord, the rent can no longer accrue.⁹⁵ The re-entry, however, does not preclude the landlord from suing for and recovering arrears of rent which may have accrued prior to the re-entry.⁹⁶ Thus, for example, an action lies for rent accrued prior to re-entry for a forfeiture though by the express terms of the lease, the lessor on such re-entry takes the premises as though such lease had never been made.⁹⁷ After a re-entry by a landlord for a forfeiture which

⁹³ *Boston El. Ry. Co. v. Grace & Hyde Co.*, 112 Fed. Rep. 279, 286, 50 C. C. A. 239, holding that a lessor who enters for other reasons cannot justify his entry by assigning a breach of a covenant which he had not in fact acted upon at the time of the entry. The lessor must determine the tenant's right of possession by entry or notice of a suit for the possession. *Small v. Clark*, 97 Me. 304, 54 Atl. Rep. 758.

⁹⁴ *Fell v. Dentzel* (Del.), 42 Atl. Rep. 439; *Wilson v. Goldstein*, 152 Pa. St. 524, 31 W. N. Cases, 448, 25 Atl. Rep. 493; *Mackubin v. Whitcroft*, 4 Har. & McH. (Md.)

135; *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. Rep. 957; *Brigham Young Trust Co. v. Wagener*, 13 Utah, 236, 44 Pac. Rep. 1030; *Mattice v. Lord*, 30 Barb. (N. Y.) 382.

⁹⁵ *Hall v. Gould*, 13 N. Y. 127; *McCready v. Lindenborn*, 172 N. Y. 400, 406, 65 N. E. Rep. 208; *Vogel v. Piper*, 89 N. Y. Supp. 431, 432; *In re Hevenor*, 144 N. Y. 271, 39 N. E. Rep. 393.

⁹⁶ *Harding v. Austin*, 93 App. Div. 564, 87 N. Y. Supp. 887, 888.

⁹⁷ *Hartshorne v. Watson*, 4 Bing. (N. C.) 178, 5 Scott, 506, 6 D. P. C. 404, 1 Arn. 15, 7 L. J. C. P. 138, 2 Jur. 155

has the effect and operation of a surrender the landlord cannot recover for the subsequent breach of any covenant. Thereafter the tenant is under no obligation to repair on his express covenant to do so. Nor can he maintain an action on any covenant which runs with the land where the breach is subsequent to his entry for condition broken. But after his entry he may treat as trespassers all persons whom he finds in possession, as, for example, an assignee of the tenant or a subtenant. The lease is absolutely at an end by the entry of the landlord and, while the landlord cannot collect any rent subsequently accruing, the tenant is also precluded from enforcing any rights which the lease may have conferred upon him. An option which he may have had under the lease to purchase the premises is terminated by the entry of the landlord upon the tenant's default⁹⁸ in all cases where the performance of all covenants and conditions by the tenant was a condition precedent to the enforcement of an option to purchase the premises vested in him. But a tenant who has given his landlord notice of his intention to exercise his option to purchase before the latter has entered for a forfeiture thereby becomes a vendee in possession and is not deprived of any right as such by a subsequent entry by the landlord. A re-entry by the landlord, not for a breach of a condition but under his statutory right to regain his possession on the tenant's failure to pay rent after an action to recover possession under the statute does not deprive him of his rights under the lease. The right of the lessor to re-enter upon a breach by the lessee of a covenant to pay rent or of any other covenant and to relet the premises as an agent of the lessee, holding the lessee liable for any deficiency, is not destroyed by a re-entry by the lessor under a warrant in summary proceedings and an action thereon may thereafter be maintained.⁹⁹ But generally an entry by a landlord for some particular breach of covenant is a waiver of his right to enter for the breach of any and every other covenant or condition in the lease. The parties to the lease may stipulate by proper language that a re-entry by the landlord shall not work a forfeiture of the right of the landlord to collect future rents. So, where it is

⁹⁸ *Ober v. Brooks*, 162 Mass. 102,
38 N. E. Rep. 429.

⁹⁹ *Baylies v. Ingram*, 73 N. E.

Rep. 1119, affirming 82 N. Y. Supp.
891, 84 App. Div. 360.

stipulated in the lease that a re-entry upon a breach of a covenant or condition shall not work a forfeiture of the rents to be paid during the full term; and the lease is not expressly declared to be terminable upon a breach of covenant, a lessor who has re-entered by virtue of a writ of restitution may collect rent for the whole term named in the lease, giving the tenant credit for any rent the landlord may have received from others after his entry upon the premises.¹ So, also, an actual re-entry or its modern equivalent, an action of ejectment by the landlord being, in effect, a surrender, deprives the sub-tenants of all rights they may have had under their leases and also relieves them of all liability to pay their rent to their landlord.² The subtenants are thereafter trespassers as far as the original landlord is concerned, and he may either oust them by appropriate proceedings at law, or convert them into his tenants by an express agreement or by permitting them to remain in possession and pay rent.³

¹ *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. Rep. 820, affirming 47 Ill. App. 568.

² *G. W. Ry. Co. v. Smith*, 45 L. J. Ch. 235, 2 Ch. D. 235, 34 L. T. 267, 24 W. R. 443, 47 L. J. Ch. 97, 3 App. Cas. 165, 37 L. T. 645, 26 W. R. 130.

³ In New York a provision that a lessor may on the failure of the lessee to pay rent enter upon the premises, remove all persons therefrom and enjoy the former estate therein construed in connection with a provision that the lessor may, at his option let them and hold the lessee for any deficiency means a common-law entry. No rights would accrue to the lessor on this covenant after his entry unless he entered by a common-law action of ejectment. No liability for future rent attaches to the tenant under such a lease where the entry by the landlord is brought about by an entry after a judgment in summary proceed-

ings. The action of the landlord in procuring and issuing a warrant in summary proceedings puts an end to the lease for all purposes. But this rule was regarded as very technical and met with strong dissent. *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. Rep. 425. In *McCreedy v. Lindenborn*, 172 N. Y. 400, 65 N. E. Rep. 208, the landlord re-entered pursuant to a covenant the tenant to pay any deficiency by the tenant and the court holding that such a covenant survived a re-entry said: "The right of action upon the covenant broken prior to re-entry survived that act, and the plaintiff was at least entitled to recover rent, as such, for the month named." And again: "One unbroken covenant survived re-entry because it provided expressly for that contingency by authorizing the lessor to relet the premises, and requiring the lessee to pay any deficiency in equal monthly

§ 395. **The effect in general of failure to pay rent.** In the absence of a statutory provision to that effect, or of some express provision for a forfeiture in the lease, a failure on the part of the tenant to pay rent does not work a forfeiture of his right to possession. This rule, it is said, is too clear to need support from any authority.⁴ Hence, where by an agreement it is stipulated that a sublease is to be made containing an abstract of covenants in the original lease and the agreement also provides that the undertenant shall not sublet without consent, the undertenant holds under the agreement which incorporates the covenants of the original lease with the proviso for re-entry which in that instrument is attached to them but the agreement cannot be read as applying a proviso for re-entry to the new clause agreeing not to underlet without consent.⁵ It is very common and well nigh universal to provide by an express stipulation that a failure to pay rent shall work a forfeiture of the term. A provision that any breach of any covenant or condition of the lease shall work a forfeiture applies to a covenant to pay rent.⁶ A provision in the lease that a breach of any covenant therein shall operate as a forfeiture, or shall confer a right to re-enter upon the landlord, or shall render the lease void will usually have the same effect. In very many of the states statutes have been enacted which in effect provide that the lease shall be forfeited by the tenant upon his refusal or failure to pay rent. It is seldom, however, that the forfeiture is expressly de-

payments as the amount thereof should, from month to month, be ascertained by deducting from the rents reserved the rents received. By the express contract of the parties, a separate and independent ascertained by deducting from the covenant every month when there was a deficiency ascertained in the manner provided."

⁴ *Bucker v. Warren*, 41 Ark. 532; *Brown's Adm'r v. Bragg*, 22 Ind. 122, 123; *Beal v. Bass*, 86 Me. 325, 335, 29 Atl. Rep. 1088; *Vermont v. Society, etc.*, 28 Fed. Cases, 16,919, 1 Paine, 652; *Bartlett v. Greenleaf*, 11 Gray (Mass.) 98; *Ocean Grove C. M. Ass'n v.*

Sanders (N. J. 1903), 54 Atl. Rep. 448; *De Lancey v. Ga Nun*, 12 Barb. (N. Y.) 120; *Ewing v. Miles*, 12 Tex. Civ. App. 19, 27, 33 S. W. Rep. 235; *Judson v. Gurley*, 52 Tex. 226; *Crawley v. Price*, L. R. 10 Q. B. 302, 33 L. T. 203, 23 W. R. 874; *Shaw v. Coffin*, 14 C. B. (N. S.) 372.

⁵ *Crawley v. Price*, L. R. 10 Q. B. 302, 33 L. T. 203, 23 W. R. 874.

⁶ *Chapman v. Kirby*, 49 Ill. 211; *Bacon v. Western Furniture Co.*, 53 Ind. 229, 230; *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. Rep. 833; *Wilson v. Jones*, 1 Bush (Ky.) 173; *Gould v. Bugby*, 6 Gray (Mass.) 371.

clared by the statute. These statutes confer upon the landlord a remedy for the recovery of the possession of the premises upon the failure of the tenant to pay the rent. The proceedings taken in accordance with their provisions are usually of a summary nature and they are intended to give the landlord a remedy for the recovery of the premises which shall be more expeditious and less expensive than an action of ejectment. If the lease contains an express declaration of forfeiture on a breach, the institution by the landlord of a summary proceedings under one of these statutes is usually regarded as a re-entry on his part. If there is no forfeiture declared by the lease, nevertheless the lease is forfeited by the operation of the statute as soon as the landlord has put into operation the remedy which is conferred upon him.

§ 396. **The necessity for a demand by the lessor in order to work a forfeiture.** The lease may be forfeited by the tenant for a breach of a covenant or condition and he may thereafter be ousted from the premises by an action of ejectment or other judicial proceeding according to the statute. The landlord cannot, however, either at common law or under the statutes, as a general rule, summarily eject the tenant on the occurrence of a forfeiture and assume possession without a demand or at least some notice to the tenant with an opportunity for the tenant to be heard in court.⁷ A mere taking possession of the premises after a forfeiture when they are deserted by the tenant is not sufficient and a re-entry made by the landlord in such a manner is of no effect.⁸ A provision for a forfeiture of the lease upon the failure of the tenant to pay rent cannot be enforced on the default of the tenant unless the landlord shall prove that a demand for the payment of the rent has been made by him.⁹ The same rule is applicable to a forfeiture which is

⁷ *Murphy v. Century Building Co.*, 90 Mo. App. 621.

⁸ *Robey v. Prout*, 7 D. C. 81, affirmed in 15 Wall. (U. S.) 471, 475, 476. In which case the court said, quoting from *Connor v. Bradley*, 1 How. (U. S.) 217: "It is a settled rule at the common law that where a right of reentry is claimed on the ground of for-

feiture for the non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset on the day when the rent is due, upon the land in the most notorious place of it, though there be no person on the land to pay."

⁹ *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. Rep. 153; *Robey v. Prout*, 7

based upon the breach by the tenant of any other covenant or condition binding upon him.¹⁰ The landlord must demand that the tenant shall perform the condition or covenant which is obligatory on him by the lease before he can bring ejectment.¹¹ It is competent for the parties to a lease to waive the right to have a demand made by the lessor upon the lessee as a prerequisite for a forfeiture. This would be the construction of a provision for re-entry upon the failure of the lessee to pay rent "without any notice whatever."¹² But a waiver of a demand by the tenant must be made in express language for it can only be implied from such circumstances as will furnish clear and convincing proof of an intention on the part of the tenant to waive his right to a demand of the performance of the condition or covenant. A demand is not necessary as a basis to enforce a forfeiture where the landlord is in possession with the consent of the tenant and there is no clause providing for a re-entry.¹³

D. C. 81, affirmed 15 Wall. (U. S.) 472, 475; *Howland v. White*, 48 Ill. App. 236; *Taylor v. Brice*, 7 Ind. App. 551, 34 N. E. Rep. 833; *Cole v. Johnson*, 120 Iowa, 667, 94 N. W. Rep. 1113; *Chandler v. McGinnins*, 8 Kan. App. 421, 55 Pac. Rep. 103; *Murphy v. Century Building Co.*, 90 Mo. App. 621; *Haynes v. Union Investment Co.*, 35 Neb. 766, 53 N. W. Rep. 97; *Cannon v. Wilbur*, 30 Neb. 777, 47 N. W. Rep. 85; *Godwin v. Harris* (Neb. 1904), 98 N. W. Rep. 439; *Eichenlaub v. Neil*, 3 Ohio Dec. 365, 10 Ohio Cir. Ct. Rep. 427; *Westmoreland v. Cambria National Gas Co.*, 130 Pa. St. 235, 18 Atl. Rep. 724, 25 W. N. Cases, 103; *Parks v. Hays*, 92 Tenn. 161, 163, 22 S. W. Rep. 3; *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 11 Sup. Ct. Rep. 691; *Kansas City Elev. Co. v. Union Pac. Ry. Co.*, 17 Fed. Rep. 200, 202; *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509, 61 Atl. Rep. 157; *Carpenter v. Wilson*, 100 Md. 13,

59 Atl. Rep. 186; *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. Rep. 641.

¹⁰ *Durkee v. Carr*, 38 Oreg. 189, 63 Pac. Rep. 117. Where rent is payable in instalments and the lessor consents that an amount due for several months shall stand until a subsequent date, ejectment cannot be maintained until a demand has been made after the date has been passed and the tenant is in default. *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. Rep. 153.

¹¹ *Molineux v. Molineux*, Cro. Jac. 144; *Doe d. Foster v. Wandlass*, 7 T. R. 117; *Acocks v. Phillips*, 5 Hon. 183; *Barr v. Glover*, 10 Ir. Com. L. Rep. 113; *West v. Davis*, 7 East, 363; *Dixon v. Roe*, 7 C. B. 134; *Smith and Bustard's Case*, 1 Leon, 141, Co. Litt. 202a, 1 Wm. Saunders, 287.

¹² *Pendill v. Union Mining Co.*, 64 Mich. 172, 31 N. W. Rep. 100.

¹³ *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. Rep. 754, holding that

§ 397. **Waiver of the demand for the rent.** The parties to the lease may expressly or by necessary implication waive a demand for the rent.¹⁴ The requirement of the law that a demand for the rent must be made upon the premises may be waived by a stipulation in the lease making the rent payable at some other place. It is competent for the parties to the lease to agree in express language that no demand for the rent shall be required and that the landlord may at once, on the failure of the tenant to pay the rent, re-enter upon the demised premises.¹⁵ Waivers of the right of the tenant to have a demand made upon him for the rent are not favored and are never created by implication.¹⁶ A provision that if the lessee shall neglect to pay the rent the lease shall thereupon expire and terminate, and that the lessor may thereupon re-enter upon the premises does not dispense with a demand for the rent.¹⁷ For the phrase "expire and terminate" means expire and terminate at the lessor's option being equivalent in meaning to the stipulation that a lease shall be void in case the lessee fails to keep his covenants which is generally held to mean voidable at the option of the lessor.¹⁸ The tenant may waive the demand of rent on the premises or at any particular place by promising or by giving the landlord to understand that he will pay it at some other place. If the landlord, by reason of the tenant's promise to pay the rent at some place specified other than the place named in the lease, absents himself from the latter place as a result of which the landlord does not demand the rent on the day named, the conduct of the tenant is a waiver of the demand.¹⁹

where the lessor remained in possession an execution of a new lease to another party was a sufficient declaration of forfeiture. In reference to a condition in an agreement for a lease under which the tenant entered and by which he was to have a lease on certain repairs being made by him, see *Hayne v. Cumming*, 16 C. E. (N. S.) 421, 10 Jur. (N. S.) 773, 10 L. T. 341, in which it was held that the landlord might re-enter at once on a breach of condition

without giving six months' notice to quit.

¹⁴ *Norris v. Marrill*, 43 N. H. 213.

¹⁵ *Lewis v. Hughes*, 12 Colo. 208, 20 Pac. Rep. 621.

¹⁶ *Gaskill v. Trainor*, 3 Cal. 334.

¹⁷ *Bowman v. Foot*, 29 Conn. 331, 338.

¹⁸ *Bowman v. Foot*, 29 Conn. 331, 338; *Jones v. Carter*, 15 M. & W. 718; *Jackson v. Harrison*, 17 Johns. (N. Y.) 66.

¹⁹ *Fisher v. Smith*, 48 Ill. 184.

§ 398. The entry of landlord for the purpose of a reletting.

At common law, if a lessee broke a covenant of the lease, either the covenant to pay rent or some other covenant, and if the lessor had the right to re-enter for a breach of a covenant, the lessor might take either of two courses. He might abstain from a re-entry, in which case the lessee remained liable on his covenant to pay rent until the end of the term, or, on the other hand, he might re-enter and resume the possession, in which case it was a surrender and the lessee's liability to pay rent was at an end. If the lessor did not re-enter, he retained all his rights against the lessee, but risked losing the rent for his property by reason of the lessee's possible insolvency. If he re-entered he gained the right to seek a solvent tenant, but ran the risk of losing the rent of the premises by reason of his inability to find one. Hence, in order to enable the landlord to retain his hold upon his former tenant while at the same time he should enjoy the opportunity of securing a new one it became common to insert a proviso in the lease to the effect that the landlord may re-enter the premises upon the failure of the tenant to pay rent and may re-let them on the tenant's account with the right to hold the tenant liable for any deficiency in the amount received as rent during the remainder of the term. Usually a provision that a landlord may re-enter the premises and may re-let them for the benefit of the lessee will be strictly construed in favor of the tenant. In case the landlord re-enters in a case where he has no right to re-enter and to relet, his re-entry will be taken as the acceptance of a surrender and will discharge the tenant from all future liability under the lease,²⁰ if the tenant so elects. On the other hand under such circumstances, the tenant may treat an illegal entry and a re-letting by the landlord as an eviction and he may recover his damages from the landlord for the loss of the term.²¹ A covenant that a lessor may on the breach

²⁰ *Burhans v. Monier*, 38 App. Div. 466, 56 N. Y. Supp. 632.

²¹ A landlord who under the lease has the right to enter on the premises in case they shall become vacant is guilty of an eviction where he enters without the premises being vacant. The premises are not vacant merely be-

cause the tenant does not reside there. Thus premises which were leased for a lodging-house are not vacant merely because the keeper of the house lives elsewhere, if the house is occupied by the lodgers. *Burhans v. Monier*, 38 App. Div. 466.

of any covenant in the lease, re-enter on the premises and at his discretion re-let them at the risk of the lessee who shall be liable for the ensuing loss of rent, if any, which shall thereby be sustained by the lessor, requires that the lessor shall re-let or attempt to re-let the premises after his re-entry before he can hold the lessee liable under the covenant. A mere re-entry alone is not sufficient for it puts an end to the lease with all its covenants. The lessor must attempt honestly and in good faith to secure a new tenant for the premises and if he is then unsuccessful, his former tenant continues liable.²²

§ 399. Demand for payment of the rent—when and how made. The demand for rent by the landlord in order to constitute a proper basis for a forfeiture must, at common law,

²² "A covenant like that here in question, not uncommon in Massachusetts, has for its object to give the lessor some of the advantages which result from both the courses before described. The lessor is permitted to seek a solvent tenant without letting go his hold upon the old one. The covenant does not compel the lessor to relet or to attempt to relet if he does not wish to do so. He need not avail himself of the covenant. He may still abstain from re-entry and so hold the lessee liable for rent *eo nomine*. He may still re-enter, and thereafter may use the premises as he sees fit, or may leave them wholly unused. The lessee cannot complain of either action. By the first he is left in possession of the premises, by the second he is relieved from his liability, under the covenant, to pay rent. On the other hand, the lessor may avail himself of the covenant. He may reenter and may exercise his discretion to relet the premises at the risk of the lessee. The exercise of this discretion is manifested by a reletting or by an attempt to relet. If there is an

actual reletting, the covenant becomes operative and the original lessee is liable for the deficiency of rent, at any rate if the reletting is honestly and reasonably made. If an honest and reasonable attempt to relet is made without success, then also the lessee is liable; the lessor need not go through the form of a reletting. But if the lessor does not relet, and makes no attempt to relet, he has not exercised the discretion nor has he made the election given him by the covenant, and, as we hold, it is only upon the exercise of the lessor's discretion to relet that the covenant imposes a liability upon the lessee. The re-entry has terminated the lessor's right to recover rent *eo nomine*, and the right given by the covenant to recover the difference between the old rent and the new does not arise until the election to relet has been made by the lessor." By the court in *Weeks v. International Trust Co.*, 125 Fed. Rep. 370, 375, citing *Way v. Reed*, 6 Allen (Mass.) 364; *Bowditch v. Raymond*, 146 Mass. 109, 15 N. E. Rep. 285.

state that it is a demand for the precise and specific amount of rent then due, must be made of the tenant or person who may be found in possession, must be made upon the premises where no other place of payment is expressly mentioned in the lease, and must be made at a reasonable time before sunset of the day upon which the rent becomes due.²³ The demand for the rent must be made on the lessee or the occupant in person. The service of a written demand by mail may not be sufficient where it does not appear that the lessee ever received it or that there was any good or sufficient reason why the demand was not served on him personally.²⁴ The demand must be made on the day the rent falls due at a reasonable time before sunset.²⁵ The demand must be made upon the premises²⁶ and if there be a dwelling house there, the demand must be made at the front

²³ *Bacon v. Western Furniture Co.*, 53 Ind. 229, 230; *Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217; *Chipman v. Emeric*, 3 Cal. 273; *Gaskill v. Trainer*, 3 Cal. 334; *Gage v. Bates*, 40 Cal. 384; *McGlynn v. Moore*, 25 Cal. 384; *Bowman v. Foot*, 29 Conn. 331, 342; *Camp v. Scott*, 47 Conn. 366, 375; *Chapman v. Wright*, 20 Ill. 120; *Jenkins v. Jenkins*, 63 Ind. 415, 422, 30 Am. Rep. 229; *Chapman v. Hainey*, 100 Mass. 353; *Blackman v. Welsh*, 44 Mo. 41; *Haynes v. Union Inv. Co.*, 35 Neb. 766, 53 N. W. Rep. 979; *Jones v. Reed*, 15 N. H. 68; *Jewett v. Berry*, 20 N. H. 36; *McQueston v. Morgan*, 34 N. H. 400; *Remsen v. Conklin*, 18 Johns. (N. Y.) 447; *Boyd's Lessee v. Talbot*, 12 Ohio, 212; *Smith v. Whitbeck*, 13 Ohio St. 471; *Wilcox v. Cartwright*, 1 Sack. Leg. Rec. (Pa.) 130; *Follin v. Coogan*, 12 Rich. (S. Car.) Law, 44; *Willard v. Benton*, 57 Vt. 286; *Prout v. Roby*, 15 Wall. (U. S.) 471, 476; *Connor v. Bradley*, 1 How. (U. S.) 217; *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 33, 11 Sup. Ct. Rep. 691, 35 Law. ed.

332; *Bishop v. Trustees of Bedford Charity*, 28 Law Jour. 215; *Dixon v. Roe*, 7 C. B. 134; *Forster v. Wandlass*, 7 T. R. 117; *Smith & Bustard's Case*, 1 Leon. 141.

²⁴ *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 33, 11 Sup. Ct. 691, 35 Law. ed. 332.

²⁵ *Phillips v. Tucker*, 3 Ind. 132; *Meni v. Rathbone*, 21 Ind. 454; *Jenkins v. Jenkins*, 63 Ind. 415, 422, 30 Am. Rep. 229; *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. Rep. 833; *Sperry v. Sperry*, 8 N. H. 477; *Remsen v. Conklin*, 18 Johns. (N. Y.) 447; *New York Academy v. Hackett*, 2 Hilt. (N. Y.) 217; *Jackson v. Harrison*, 17 Johns. (N. Y.) 66; *Co. Litt.* 202a; *Jones v. Reed*, 15 N. H. 68; *Smith v. Whitbeck*, 13 Ohio St. 471.

²⁶ *McGlynn v. Moore*, 25 Cal. 384; *Bowman v. Foot*, 29 Conn. 331, 342; *Camp v. Scott*, 47 Conn. 366, 375; *Smith v. Whitbeck*, 13 Ohio St. 471.

²⁷ *McGlynn v. Moore*, 25 Cal. 384; *Burroughs' Case*, 4 Coke, 73; *Buskin & Edmund's Case*, Cro. Eliz. 415; *Co. Litt.* 201b, 202a.

door of such house.²⁷ The demand must correctly state the name of the person by whom the lease was given,²⁸ and must be for the precise sum of rent which is due.²⁹

§ 400. **Who may exercise the right to re-enter.** At the common law no one but the grantor or his heirs could re-enter for a breach of a condition. The right to re-enter for a condition broken was not assignable so that no grantee or assignee of the reversion could take advantage of the breach of the condition by a re-entry.³⁰ The reason of this was said to be in order to discourage maintenance, the suppression of right and the stirring up of lawsuits. By statute, however,³¹ all grantees of the reversion, their executors, heirs, successors and assigns were decreed to have the same advantage against the lessees, their executors, administrators or assigns, by entry for non-payment of rent or for doing waste or other forfeiture, with the same remedy by action for a condition in the lease as the lessors or grantors had before them. This act, it was held, applied only to leases in writing and under the seal.³² The words "other forfeiture" in the statute, although general in their meaning, do not include every breach of a condition but only breaches of those conditions which are incident to the reversion, as the payment of rent, or for the benefit of the estate, as for not wasting it or keeping the premises in good repair. So, it has been held that the breach of a condition not to assign without a license from the lessor is a breach of a collateral condition which is not within the statute.³³ This statute, however, and the similar statutes which have been based upon it in the various states by which the right of a lessor to enforce a condition by re-entry is conferred upon his grantee, do not make what was before their passage a mere chose in action an estate in the land.³⁴ Hence, such right to enforce a forfeiture is not an estate or interest in

²⁸ *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 11 Sup. Ct. 691, 35 L. ed. 332.

²⁹ *Wildman v. Taylor*, 4 Ben. 42, 29 Fed. Cas. No. 17,654; *Gage v. Bates*, 40 Cal. 384; *Smith v. Whitbeck*, 13 Ohio St. 471.

³⁰ Litt. s. 374; Co. Litt. 214; *Cole, Ejec.* 405.

³¹ 32 Hen. VIII, c. 34.

³² *Standen v. Christmas*, 10 L. J. Q. B. 135; *Bickford v. Parson*, 5 C. B. 920, 930; *Brydges v. Lewis*, 3 L. J. Q. B. 603.

³³ *Lucas v. How*, Sir T. Raym. 250; *Collins v. Sillye*, Styles, 265; *Pennant's Case*, 3 Coke, 64.

³⁴ *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. Rep. 920, 923.

the land which can be sold, alienated or conveyed as such. It is not necessarily an incident of the reversion, or a part of it, for the grantor when he re-enters is not in possession by reason of any rights of ownership which he had as owner of the reversion but he is in possession by reason of the forfeiture.³⁵ Hence, because of this rule, it has been held that a lessor who had demised his whole interest subject to a right to re-enter on breach of condition, may himself enter on condition broken, though he had no reversion.³⁶ In other words, at common law a stranger to the lease cannot enter for a breach of condition. Thus, a beneficiary of a trust though he joins in the lease and a power of re-entry is reserved to him in it in express words cannot maintain ejectment in his own right against a lessee for a breach of condition. The execution of the lease by the beneficiary is merely formal and as a confirmation of the execution of a power in the trustees. Nor does it matter that the beneficiary who is named in the lease is to receive the rents which may accrue thereunder and the sole trustee dies leaving no one who has a legal title to the premises. The power to re-enter can under these circumstances be exercised by a trustee only and while the common law will make no allowance for the peculiar circumstances in which the beneficiary finds himself, i. e., unable to collect the rents and at the same time unable to oust a non-rent paying tenant, a court of equity will, on proper application, appoint a new trustee to act for the benefit of the *cestui que trust* in this emergency.³⁷ In some cases of leases of land for mining purposes where a forfeiture has occurred by a failure on the part of the lessee to develop the land, it has been held that a grantee of the lessor or the heirs of such grantee may enforce the forfeiture and enter for condition broken.³⁸ An assignee of a part of the reversion who takes an estate as a tenant for years, or life, in all the lands assigned may be, so far as the lessee is concerned, a grantee within the meaning of the statute,

³⁵ Southard v. Railroad Co., 26 N. J. Law, 21; Webster v. Cooper, 14 How. (U. S.) 501.

³⁶ Doe d. Freeman v. Bateman, 2 B. & Ald. 168, 20 R. R. 399 On the question whether the right of a lessor to re-enter for forfeiture is assignable, see Hunt v Rem-

mant, 9 Ex. 635, 23 L. J. Ex. 135, 18 Jur. 335, 2 W. R. 276.

³⁷ Doe d. Barker v. Goldsmith, 2 C. & J. 674, 2 Tyr. 710, 1 L. J. Eq. 256.

³⁸ Island Coal Co. v. Coombs, 152 Ind. 379, 390, 53 N. E. Rep. 452, 456.

and he may consequently have the advantage of the condition broken during his term.³⁹ But an assignee of the reversion in a part of the land is not a grantee within the statute. For the condition being an entire condition cannot be apportioned by the lessor without the consent of the lessee, and an attempt to apportion it without the consent of the lessee will destroy it.

§ 401. **The lessee cannot take advantage of a forfeiture.** Inasmuch as the landlord alone has an absolute right to elect whether he shall enforce a forfeiture or whether he shall waive it, the tenant cannot base a refusal to pay rent upon the fact that the lease has been forfeited by his default. The lease is not absolutely void upon the forfeiture or default of the tenant but is voidable merely and is still enforceable by the landlord as a valid lease if he shall elect to enforce it.⁴⁰ The lessee cannot himself take advantage of a forfeiture so that by failing to pay rent he can put an end to the lease and thus release himself and his sureties if there be any, from liability for the nonpayment of future instalments of rent. A forfeiture being for the benefit of the lessor and not for the benefit of the lessee may be waived by the lessor alone.⁴¹ So, an assignee of a lessee cannot refuse to pay rent to the original lessor upon the ground that the lease

³⁹ Co. Litt. 215a; *Attoe v. Hemmings*, 2 Bulst. 281; *Kidwelly v. Brand*, Plow. 71, 72; *Isherwood v. Oldknow*, 2 M. & S. 283; *Wright v. Burroughs*, 3 C. B. 685.

⁴⁰ *Evans v. Consumers' Gas Co. (Ind.)*, 29 N. E. Rep. 398; *Edmonds v. Mounsey*, 15 Ind. App. 399, 44 N. E. Rep. 196; *Chicago Attachment Co. v. Davis Sewing Machine Co. (Ill.)*, 25 N. E. Rep. 669; *Proctor v. Keith*, 12 B. Mon. (Ky.) 252, 254; *Morrison v. Smith*, 90 Md. 76, 44 Atl. Rep. 1031; *In re Assignment of Dickinson Co.*; *Welch v. Flitterling*, 72 Minn. 483, 75 N. W. Rep. 731; *Creveling v. West End Iron Co.*, 51 N. J. Law, 34, 16 Atl. Rep. 184; *Smith v. Miller*, 49 N. J. Law, 521, 13 Atl. Rep. 39; *Mathews v. People's Nat. Gas. Co.*, 179 Pa. St.

165, 36 Atl. Rep. 216; *Liggett v. Shira*, 159 Pa. St. 350, 28 Atl. Rep. 218, 33 W. N. Cases, 553; *Wills v. Gas Co.*, 130 Pa. St. 222, 18 Atl. Rep. 721; *Ray v. Gas. Co.*, 138 Pa. St. 576, 20 Atl. Rep. 1065; *Ogden v. Hatry*, 145 Pa. St. 640, 23 Atl. Rep. 334; *Phillips v. Vandergrift*, 146 Pa. St. 347, 23 Atl. Rep. 347; *Jones v. Western Pennsylvania Gas Co.*, 146 Pa. St. 204, 211, 23 Atl. Rep. 386, 29 W. N. Cases, 266; *Morris v. De Wolf*, 11 Tex. Civ. App. 701, 33 S. W. Rep. 556; *Brady v. Nagle (Tex.)*, 29 S. W. Rep. 943.

⁴¹ *English v. Yates*, 205 Pa. St. 106, 54 Atl. Rep. 503; *Gibson v. Oliver*, 158 Pa. St. 277, 27 Atl. Rep. 961; *Cochran v. Pew*, 159 Pa. St. 184, 28 Atl. Rep. 219, 33 W. N. C. 547.

was forfeited and that the assignment to him is void because it was provided by a stipulation in the lease that it should not be assigned without the consent of the lessor.⁴² A provision that, upon the non-performance of a condition by the lessee, the lease shall be null and void means only that it shall be null and void at the election of the lessor. The lessee cannot invalidate the lease and deprive the lessor of his rights under it by a default in the performance of a covenant as by a failure to pay his rent when it is due.⁴² So, too, in the case of leases for mining purposes or to enable the lessee to work land for mineral oil, where it is provided that the lessee must begin mining or drilling on or before a certain date and it is also provided that the term shall be forfeited in case he shall not do so, the lessee can neither refuse to perform nor escape the consequences of a default in performing by his failure to begin operation. Under

⁴² *Chicago Attachment Co. v. Davis Sewing Machine Co.* (Ill.), 25 N. E. Rep. 669; *Dickinson's Assignment*, 72 Minn. 483, 75 N. W. Rep. 731.

⁴³ *Morrison v. Smith*, 90 Md. 76, 44 Atl. Rep. 1031; *Creveling v. West End Iron Co.*, 51 N. J. Law, 34, 16 Atl. Rep. 184 (in which case the land was on forfeiture to go to the lessor "as though the lease had never been made."). See, also, to same effect, *Smith v. Miller*, 49 N. J. Law, 521, 13 Atl. Rep. 39; *Leggett v. Shira*, 159 Pa. St. 350, 28 Atl. Rep. 218, 33 W. N. Cases, 553. A clause in a lease stating that it shall be void on a breach of a condition by the lessee means only that it is voidable at the option of the lessor even in a case where the condition was imposed on the lessee by a statute. *Doe v. Bancks*, 4 B. & A. 401; *Roberts v. Daver*, 4 B. & A. 664; *Davenport v. Regina*, 47 L. J. P. C. 8, 3 App. Cases, 115, 37 L. T. 727. In *Hartshorne v. Watson*, 4 Bing. N. C. 178, there was a provision that on a failure to pay rent

the lessor was to have possession again as if the lease had never been made. In *Arnsby v. Woodward*, 6 Barn. & C. 519, the lease provided that on a default in the payment of the rent, or if any covenant in the lease should be broken, the lease was to be void. In *Rede v. Farr*, 6 Maule & S. 121, the condition was similar. In *Doe v. Banckes*, 4 Barn. & Ald. 401, a proviso in the lease was that if the lessee should fail to work the mine demised the lease should be void. In all these cases the lease was held to be voidable only at the option of the lessor, and not absolutely void upon a breach of condition. A proviso that on a certain event the lessor may re-enter and have the premises "as if the lease had never been made" does not render the lease void *ab initio* on entry, but only avoids the lease from the date of entry. *Hartshorne v. Watson*, 4 Bing. N. C. 178, 5 Scott, 506, 6 D. P. C. 404, 1 Arn. 15, 7 L. J. C. P. 138, 2 Jur. 155.

such circumstances if it is stipulated that the lessee shall pay a certain fixed monthly rental, the payments to begin on his refusal or failure to begin operations the lessor may waive the forfeiture and recover the rent which the lessee has agreed to pay.⁴⁴ This is true though it is expressly stipulated in a mining or oil lease that upon the failure of the lessee to begin operations the lease shall be "null and void" and also that all rights and obligations thereunder shall cease "with like effect as though the agreement had never been made."⁴⁵ The rule seems firmly established by all the decisions both in England and America that however absolute and certain the words of forfeiture may be, even though they shall expressly declare the lease null and void or at an end, they will be always construed as meaning that it is voidable merely and this at the option of the lessor. They will be considered as having no other object than to enable the lessor to treat the lease as void or not at his election unless an election to do this be in express terms given to the lessee as well.⁴⁶ A surety for the payment of the rent by the lessee cannot defeat the right of the lessor to recover against him on the failure of the lessee to pay rent due subsequent to a forfeiture by show-

⁴⁴ Mathews v. People's National Gas Co., 179 Pa. St. 165, 36 Atl. Rep. 216.

⁴⁵ Ogden v. Hater, 145 Pa. St. 640, 23 Atl. Rep. 334, following Wills v. Gas Co., 130 Pa. St. 222, 18 Atl. Rep. 721; Ray v. Gas Co., 138 Pa. St. 576, 20 Atl. Rep. 1065. And see, also, Phillips v. Vandergrift, 146 Pa. St. 357, 23 Atl. Rep. 347. The construction of the provision that a lease shall be null and void on the default of the lessee to perform a covenant in it cannot be varied by showing the uniform custom of the parties in construing other similar provisions. Jones v. Western Pennsylvania Gas Co., 146 Pa. St. 204, 211, 23 Atl. Rep. 286, 29 W. N. Cases, 266.

⁴⁶ "The legal effect of a clause in a gas or oil lease that "a failure

to complete such well or to pay such rental shall render this lease null and void, and it can only be renewed by mutual consent," is that the forfeiture is for the benefit of the lessor only and is at his option. Such an effect can be changed only by an express stipulation that the lease shall be voidable at the election of either party or of the lessee. If a lease is to become "null and void" it is not made any more so by a provision that it "shall be of no effect between the parties," or "can only be renewed by mutual consent," or other cumulative phrases of the same meaning. The legal effect of such a clause always is that the forfeiture is for the benefit of the lessor at his option." Jones v. West. Penn. Gas Co., 146 Pa. St. 204, 211, 23 Atl. Rep. 386.

ing that a forfeiture has accrued unless he can also show that the lessor has enforced the forfeiture by a re-entry and that the relationship of landlord and tenant and the consequent liability of the latter for rent has thus been terminated.⁴⁷

§ 402. **The waiver of a forfeiture by the lessor.** The right of re-entry upon the breach of a condition being clearly for the benefit of the lessor exclusively may be waived by him.⁴⁸ The

⁴⁷ *Clark v. Jones*, 1 Denio (N. Y.) 516, 43 Am. Dec. 706. A provision that a lease shall be void on the occurrence of a certain event means that it shall be voidable at the option of the lessor only, and he may waive the breach. *Armsby v. Woodward*, 6 B. & C. 519, 9 D. & R. 536, 5 L. J. (O. S.) K. B. 199; *Doe d. Nash v. Birch*, 1 M. & W. 402, 5 L. J. Ex. 185; *Reid v. Parsons*, 2 Chit. 247; *Doe d. Green v. Baker*, 2 Moore, 189, 8 Taunt. 241, 19 R. R. 502.

⁴⁸ *Dahm v. Barlow*, 93 Ala. 120, 9 So. Rep. 598; *Randal v. Tatum*, 98 Cal. 390, 33 Pac. Rep. 433, 435; *Willoughby v. Lawrence*, 116 Ill. 11, 22, 4 N. E. Rep. 356; *Webster v. Nichols*, 104 Ill. 160, 172; *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. Rep. 920, 16 Am. St. Rep. 274; *Chicago Attachment Co. v. Davis Sewing Machine Co.* (Ill. 1889), 25 N. E. Rep. 669, affirming 33 Ill. App. 362; *Springer v. Chicago R. E. Loan Co.*, 202 Ill. 17, 26, 66 N. E. Rep. 850, affirming 102 Ill. App. 294; *Channel v. Merrifield*, 206 Ill. 279, 283, 69 N. W. Rep. 32, reversing 106 Ill. App. 243; *Colton v. Gorham*, 72 Iowa, 324, 325, 33 N. E. Rep. 76; *Reid v. Weissner & Sons Brewing Co.*, 88 Md. 234, 40 Atl. Rep. 877; *Morrison v. Smith*, 90 Md. 76, 44 Atl. Rep. 1031; *O'Keefe v. Kennedy*, 3 Cush. (Mass.) 325; *Porter v. Merrill*, 124 Mass. 534; *Chalmers v.*

Smith, 152 Mass. 561, 26 N. E. Rep. 95; *Shattuck v. Lovejoy*, 8 Gray (Mass.) 204; *Tyler's Estate v. Gresler*, 74 Mo. App. 543; *B. Roth Tool Co. v. Champion Spring Co.*, 93 Mo. App. 530, 67 S. W. Rep. 967; *Hynes v. Ecker*, 34 Mo. App. 650; *In re Assignment of Dickinson Co.*, *Welch v. Fitterling*, 72 Minn. 483, 75 N. W. Rep. 731, 732; *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509, 61 Atl. Rep. 157; *Heeter v. Eckstein*, 50 How. Pr. (N. Y.) Rep. 445; *McMurray v. Harway*, 56 N. Y. 337, 342; *Jones v. Daly*, 175 N. Y. 529, 67 N. E. Rep. 1083; *Stuyvesant v. Davis*, 9 Paige Ch. (N. Y.) 427, 430; *Weisbrod v. Dembowsky*, 25 Misc. Rep. 485, 55 N. Y. Supp. 1; *Clark v. Greenfield*, 34 N. Y. Supp. 1, 13 Misc. Rep. 124; *Holman v. De Lin-River Finley Co.*, 30 Oreg. 428, 47 Pac. Rep. 708; *Garcewich v. Woods*, 73 N. Y. Supp. 154; *English v. Yates*, 205 Pa. St. 106, 54 Atl. Rep. 503; *Galley v. Kellerman*, 123 Pa. St. 491, 16 Atl. Rep. 474; *Wills v. Mann. Natural Gas Co.*, 130 Pa. St. 222, 18 Atl. Rep. 721, 5 L. R. A. 603; *Ray v. West. Penn. Natural Gas Co.*, 138 Pa. St. 576, 20 Atl. Rep. 1065, 27 W. N. Cases, 230; *Ogden v. Hatry*, 145 Pa. St. 640, 23 Atl. Rep. 334; *Jones v. West. Penn. Nat. Gas Co.*, 146 Pa. St. 204, 211, 23 Atl. Rep. 386; *Phillips v. Vandergrift*, 146 Pa. St. 347; *Leatherman v. Oliver*, 151 Pa. St. 646, 650,

waiver must be entire and relate to all the premises. The landlord cannot enforce the forfeiture as to a part of the premises and waive it as to another part.⁴⁹ According to a rule of law laid down in a case decided in England in the reign of Queen Elizabeth,⁵⁰ where a forfeiture which has been incurred by a lessee is absolutely waived by the lessor it is gone forever. It cannot thereafter be enforced by the lessor or any other person. And though this rule has met with considerable criticism in the courts, it has usually been strictly adhered to by them and is still good law in most of the states of the Union at the present time. So, for example, where a lease which is not assignable without the written consent of the lessor has been assigned and the lessor has waived the forfeiture by accepting the assignee as his tenant he cannot take advantage of a subsequent assignment by this assignee and declare a forfeiture of the lease on that account.⁵¹ What language or conduct on the part of the

25 Atl. Rep. 309; *Westmore, etc., Natural Gas Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. Rep. 724, 5 L. R. A. 731; *Bartley v. Phillips*, 179 Pa. St. 175, 36 Atl. Rep. 217; *Granite Building Corporation v. Greene*, 25 R. I. 586, 57 Atl. Rep. 649; *Willey Lodge, etc. v. City of Paris* (Tex. Civ. App. 1903), 73 S. W. Rep. 69; *Graham v. Womack*, 82 Mo. App. 618; *Mack v. Dailey*, 67 Vt. 90, 91; *Denton v. Taylor*, 90 Va. 219, 225, 17 S. E. Rep. 944; *Gomber v. Hackett*, 6 Wis. 323; *Armbsy v. Woodward*, 6 Barn. & C. 519; *Rede v. Farr*, 6 Maule & Sel. 121; *Warner v. Cochran*, 128 Fed. Rep. 553.

⁴⁹ *Ocean Grove Land Ass'n v. Berthall*, 62 N. J. Law, 88, 40 Atl. Rep. 779, in which it was said that the landlord could not select a portion of the premises, large or small, as he might see fit, and enforce a forfeiture by an entry upon that, leaving the tenant in possession of the remainder. The landlord ought to enforce the for-

feiture against the whole of the demised premises or waive it altogether.

⁵⁰ *Dumpor's Case*, 4 Coke, 119b.

⁵¹ *Reid v. Weissner & Sons Brewing Co.*, 88 Md. 234, 40 Atl. Rep. 877; *Smith v. Clark*, 97 Me. 304, 54 Atl. Rep. 758; *Chipman v. Emeric*, 5 Cal. 49, 63 Am. Dec. 80; *Pennock v. Lyons*, 118 Mass. 92; *Siefke v. Koch*, 31 How Pr. (N. Y.) 383, 384; *Dakin v. Williams*, 21 Wend. (N. Y.) 457, following *Dumpor's Case*, 4 Coke, 119. The covenant prohibiting an assignment was, as is conceded by and alleged in the declaration, unqualifiedly waived when the assignment was made by Miller; and having been thus waived without the superaddition of a restriction on subsequent assignments, it was gone forever, and therefore was not binding on the brewing company. This principle was announced as early as the reign of Elizabeth in *Dumpor's Case*. Later decisions have carried the

lessor will in any particular case constitute a waiver of a forfeiture will usually depend upon the facts and circumstances of the case. In all cases where no conflict appears in the proof of the language or the conduct of the parties, the question is one of law but where the evidence on these points is conflicting it is for the jury or the chancellor to determine from all the facts if there has been a waiver⁵² of the forfeiture by the landlord. The general rule is that forfeitures in leases are favored neither in law nor in equity and after a forfeiture has occurred and has been declared, generally any subsequent act by a party who is entitled to take advantage of the forfeiture done with a knowledge of the facts which is inconsistent with an intention on his part to take advantage of the forfeiture may be taken in law as a waiver of the forfeiture.⁵³

§ 403. **The rent received after a forfeiture.** The receipt of rent by the landlord accruing after the breach of covenant or condition has occurred is a waiver of a forfeiture arising thereby by reason of the failure of the tenant to pay rent if for any other reason if the landlord when receiving the rent knew that a forfeiture had occurred. But the receipt of rent is never a waiver of a forfeiture where the rent was received by the landlord in ignorance that a forfeiture had occurred.⁵⁴ The money

decision further than is applied in *Dumpor's Case*, for it is held that whether the license to assign be general, as in *Dumpor's Case*, or particular as to one particular person, subject to the performance of the covenants in the original lease, still the condition is gone in both instances, and the assignee may assign without license. *Brummell v. Macpherson*, 14 Ves. 173; *Reid v. Weissner & Sons Brewing Co.*, 88 Md. 234, 40 Atl. Rep. 877.

⁵² *Jones v. Daly*, 175 N. Y. 520, 67 N. E. Rep. 1083, affirming 76 N. Y. Supp. 725, 73 App. Div. 220.

⁵³ *Channel v. Merrifield*, 106 Ill. App. 243.

⁵⁴ *Brooks v. Rodgers*, 99 Ala. 433, 12 So. Rep. 61; *Dahm v. Bar-*

low, 93 Ala. 120, 9 So. Rep. 598; *Randal v. Tatum*, 98 Cal. 390, 33 Pac. Rep. 433, 435; *Silva v. Campbell*, 84 Cal. 420, 24 Pac. Rep. 316; *Frazier v. Caruthers*, 44 Ill. App. 61; *Robbins v. Conway*, 92 Ill. App. 173; *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435; *Bacon v. Western Furniture Co.*, 53 Ind. 229, 231; *Cleve v. Mazzoni*, 19 Ky. Law Rep. 2001, 45 S. W. Rep. 88; *Morrison v. Smith*, 90 Md. 76, 44 Atl. Rep. 1031; *Collins v. Canty*, 6 Cush. (Mass.) 415; *Barber v. Stone*, 104 Mich. 90, 62 N. W. Rep. 139; *Garnhart v. Finney*, 40 Mo. 449, 460; *Stover v. Hazelbaker*, 42 Neb. 393, 60 N. W. Rep. 597; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 235; *Lewis v. Ocean Nav. & Pier*

paid must be paid as rent. If it is paid by the tenant not as rent accruing after forfeiture but as damages for detaining or trespassing on the land, its receipt by the lessor is no waiver.⁵⁵ So, also, distraining for rent which accrues after forfeiture is an absolute waiver of a forfeiture.⁵⁶ A waiver takes place where the tenant after a forfeiture releases to the landlord a portion of the premises to be credited on account of rent which has accrued.

Co., 125 N. Y. 341, affirming 2 N. Y. Supp. 911; *Michel v. O'Brien*, 6 Misc. Rep. 408, 27 N. Y. Supp. 173; *Koehler v. Brady*, 144 N. Y. 135, 38 N. E. Rep. 978, affirming 78 Hun, 443, 29 N. Y. Supp. 388; *Chase v. Knickerbocker Phosphate Co.*, 53 N. Y. Supp. 220, 224, 32 App. Div. 400, 87 N. Y. St. Rep. 220; *Mack v. Dailey*, 67 Vt. 90, 30 Atl. Rep. 686; *Pettygrove v. Rothchild*, 2 Wash. St. 6, 25 Pac. Rep. 907; *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. Rep. 151; *Gomber v. Hackett*, 6 Wis. 323, 324; *Jacob v. Down*, 69 Law J. Ch. 493, (1900) 2 Ch. 156, 83 Law T. (N. S.) 191, 48 Weekly Rep. 441, 64 J. P. 552; *Roe d. Gregson v. Harrison*, 2 T. R. 425; *Mathews v. Whetton*, Cro. Car. 233; *Goodright v. Cordwent*, 6 T. R. 219; *Doe v. Rees*, 4 Bing. (N. C.) 384; *Goodright v. Davids*, Cowp. 804; *Green's Case*, Cro. Eliz. 3; *Doe d. Bryan v. Bancks*, 4 B. & Ald. 401, Gow. 220, 23 R. R. 318; *Arnsby v. Woodward*, 6 B. & C. 319, 9 D. & R. 536, 5 L. J. (O. S.) K. B. 199; *Walrond v. Hawkins*, 44 L. J. C. P. 116, L. R. 10 C. P. 342, 32 L. T. 119, 23 W. R. 390; *Roe d. Gregson v. Harrison*, 2 T. R. 425, 1 R. R. 513; *Goodright d. Walter v. Davids*, Cowp. 803; *Doe d. Cheney v. Batten*, Cowp. 243, 9 East, 314, n, 9 R. R. 570, n.; *Hume v. Kent*, 1 Ball & B. 554. The breach of a covenant

against assignment by the lessee without the consent of the lessor may be waived by the acceptance of rent from the assignee. *Webster v. Nichols*, 104 Ill. 160; *Randal v. Tatum*, 98 Cal. 390, 33 Pac. Rep. 433, 435; *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130, 61 N. E. Rep. 816. *Contra*, *Boardman v. Davidson*, 7 Abb. Prac. (N. S.) 439. The acceptance of a month's rent from an assignee for the benefit of the creditors of the lessee, before the assignee has elected whether he would or would not accept the term, is not a waiver. *The Medinah Temple Co. v. Currey*, 162 Ill. 441, 44 N. E. Rep. 839. Until the assignee has made his election to accept or refuse the lease the lessor has the right to deal with him as to the use of the property without reference to the lease. The fact that the lessor arranged to receive some compensation for the use of the premises from him without declaring it to be rent under the lease in no way proved a waiver of the forfeiture. The question is one of intention.

⁵⁵ *Goodright d. Charter v. Cardwent*, 6 T. R. 219.

⁵⁶ *Pennant's Case*, 3 Coke, 64. 64a; *Chase v. Knickerbocker Phosphate Co.*, 32 App. Div. 400, 53 N. Y. Supp. 220, 87 N. Y. St. Rep. 220; *Blyth v. Dennett*, 13 Com. B. 178, 181.

It is not material that⁵⁷ the distraint was unsuccessful in securing payment of the amount of rent due,⁵⁸ because sufficient goods are not found upon the premises.⁵⁹ But a distress and continuing in possession, though it may be a waiver of an existing forfeiture, is not a waiver of any right which subsequently accrues to the landlord.⁶⁰ So, too, an absolute and unqualified demand for rent subsequently accruing will be a waiver of the forfeiture,⁶¹ when made by the landlord or his agent duly authorized. Thus, if the landlord gives notice to quit and thereupon begins an action to cancel the lease as forfeited, his subsequent receipt of subsequent rent will be a waiver of all his rights to a cancellation of the lease.⁶² Nor need the rent be paid in money in order that its receipt shall be a waiver. The acceptance of property or services from the tenant after a forfeiture has occurred is equally with the payment of rent in money a waiver of a forfeiture.⁶³ The rent which is received in order to be material as a waiver must be rent which accrues subsequently to the forfeiture. The receipt of rent which has accrued before the demand or which has become due before the service of a notice to quit will not operate as a waiver.⁶⁴ If the rent is payable

⁵⁷ *Brooks v. Rodgers*, 99 Ala. 433, 12 So. Rep. 61.

⁵⁸ *Browning's Case*, Plowd. 133.

⁵⁹ *Camp v. Scott*, 47 Conn. 366, 371.

⁶⁰ *Doe d. Taylor v. Johnson*, 1 Stark. 411, 18 R. R. 791. See, also, *Zouch d. Ward v. Willingale*, 1 H. Bl. 311, 2 R. R. 770; *Doe d. Flower v. Peck*, 1 B. & Ad. 428, 9 L. J. (O. S.) K. B. 60.

⁶¹ *Camp v. Scott*, 47 Conn. 366, 371; *Doe d. Nash v. Birch*, 1 Mee. & Wel. 402, 408; *Blyth v. Dennett*, 13 C. B. 178, 22 Law J. C. P. 79.

⁶² *Dahm v. Barlow*, 93 Ala. 120, 9 So. Rep. 598.

⁶³ *Frazier v. Caruthers*, 44 Ill. App. 61.

⁶⁴ *Silva v. Campbell*, 84 Cal. 420, 24 Pac. Rep. 316; *Robbins v. Conway*, 92 Ill. App. 173; *Morrison v. Smith*, 90 Md. 76, 44 Atl. Rep.

1031; *Hukill v. Myers*, 36 W. Va. 639, 647, 15 S. W. Rep. 151; *Carraher v. Bell*, 7 Wash. 81, 34 Pac. Rep. 469. "The receipt of rent after a breach of covenant does not operate as a waiver, unless the rent received accrued subsequently to the act which works the forfeiture." *Bleecker v. Smith*, 13 Wend. (N. Y.) 530; *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. Rep. 476, 21 L. R. A. 489. This rule is sustained by the weight of authority, though there are a few cases which do not recognize it. See *Mack v. Dailey*, 67 Vt. 90, 30 Atl. Rep. 686. See, also, as sustaining the text, *Price v. Warwood*, 4 H. & N. 512, 28 L. J. Ex. 329, 5 Jur. (N. S.) 472, 7 W. R. 506; *Bridges v. Longman*, 24 Beav. 27, 30.

in monthly installments in advance, the landlord waives by accepting rent in advance, his right to insist upon a forfeiture for a part of the period covered by the payment.⁶⁵ Where the conduct of the tenant constitutes a continuing ground of forfeiture the acceptance of rent by the landlord after a forfeiture has occurred is not a waiver. This would be the case where the default of the tenant consisted of the use of the premises for a purpose forbidden by the terms of the lease.⁶⁶ Though the receipt of rent may be a waiver of a forfeiture created in the past by a failure to pay rent, the tenant is not relieved from paying rent promptly in the future. The condition or covenant is one of a continuing nature. The default of the tenant and his refusal to pay after a waiver by the landlord revives the forfeiture and enables the landlord to recover possession upon a new breach of the condition.⁶⁷ The acceptance of rent by the landlord with knowledge that a forfeiture had been incurred by the tenant is a waiver only of such breaches of covenant creating a forfeiture which have occurred prior to the receipt of the rent and does not deprive him of his right to declare and enforce a forfeiture for a breach of condition occurring subsequently where each act of the tenant constitutes a continuing breach of covenant.⁶⁸ The

⁶⁵ *Barber v. Stone*, 104 Mich. 90, 92, 93, 62 N. W. Rep. 139. In this case a landlord accepted rent which had accrued for a month past and a portion of that which was payable monthly in advance, and the court held that by accepting a portion of the rent, though for future occupation, after he had served a notice of forfeiture, he had waived the forfeiture at least for the period for which rent had been paid.

⁶⁶ *Mulligan v. Hollingsworth*, 99 Fed. Rep. 216.

⁶⁷ *Gluck v. Elkan*, 36 Minn. 80, 30 N. W. Rep. 446.

⁶⁸ *Granite Building Ass'n v. Greene*, 25 R. I. 48, 54 Atl. Rep. 792. "If, after the breach of the condition of the lease, the lessor, with a full knowledge of the

breach of condition and all the circumstances, demanded and received from the lessee, under the contract of the lease, rents which accrued subsequently to the breach, this was a clear recognition that the relation of landlord and tenant continued for the time for which the rent was paid and received. A lessor cannot be permitted to get the benefit of his contract of lease after breach of condition for the purpose of collecting rents which subsequently accrued, and, after collecting the rents, then hold the lessee to be a trespasser on the land during the same period for which he collected rents under the contract of lease. The receipt of the rents under such circumstances is an affirmation that the contract of lease was

acceptance by a lessor of rent after a breach of a condition will revive the lease and waive a forfeiture though the lease expressly declares that it shall become null and void or that the term shall at once cease and determine. In law the lease is void but equity will not so regard it. Equity will not distinguish, in determining whether a forfeiture has been waived, between a lease which is expressly void on a breach of condition and one which only gives a power of re-entry. For they are practically the same except that in the former the consequences of an entry for a breach of condition precedes the provision for a re-entry while in the latter the consequences are not mentioned but obviously result from the re-entry.⁶⁹

§ 404. **The payment of the rent to a landlord after an action of ejectment or other action by a landlord for the possession.** The action of the landlord in bringing ejectment or similar proceedings to recover possession against his tenant for a forfeiture is in its effect an election on the part of the landlord to treat the lease as void. Thereafter the lease is void and cannot be revived by any action of the parties though a new lease can of course be made. The beginning of an action of ejectment is equivalent in theory and is a substitute in modern times at least for an actual physical entry by the landlord on the land and his actual ouster of the tenant and is in law operative in every respect as a surrender of the lease.⁷⁰ It follows from this rule that the receipt of rent by the landlord from the tenant after an action of ejectment has been begun cannot be pleaded by the tenant as a waiver by the landlord of his right to enforce the forfeiture and as a defense in the action of ejectment. The accept-

still in force and subsisting up to the time for which rent was collected, and that the lessee was not a trespasser during that time for which he paid rent. If the lessor receives rent only for the time prior to the breach of the condition, and if the rent is received without notice or knowledge of the breach, payment under such circumstances will not be a waiver of his right to elect to declare the estate of the lessee forfeited and of the right to re-enter." By Cole-

man, J., in *Brooks v. Rodgers*, 99 Ala. 433, 12 So. Rep. 61.

⁶⁹ *Rede v. Farr*, 6 M. & S. 121; *Bowser v. Colby*, 1 Hare, 109, 11 L. J. Ch. 132, 5 Jur. 1106; *Arnsby v. Woodward*, 6 Bar. & Cres. 519.

⁷⁰ Whether the commencement of an action by the lessor to recover the possession on a breach of a covenant will, without actual entry, determine the lease, see *Dyke*, *Ex parte Morrish*, in re, 22 Ch. D. 410, 48 L. T. 303.

ance of rent by the landlord after he has begun an action of ejectment to enforce a forfeiture is not a waiver of the forfeiture,⁷¹ though the rent had accrued prior to the forfeiture. The conduct of the landlord in bringing ejectment is from the tenant's point of view an eviction and from the landlord's point of view the acceptance of a surrender. And a landlord who has brought an action of ejectment against his tenant for a forfeiture does not waive the forfeiture by subsequently thereto distraining for the rent⁷² which was due when the forfeiture was incurred. So, also, if after the ejectment has been commenced the parties shall actually make a new lease, or shall enter into an agreement to make a new lease, whether upon the terms of the old lease or otherwise and rent is paid under such circumstances, it is a good defense for the tenant not as a waiver of the landlord's rights but as showing him in legal possession under a new arrangement.⁷³ These rules which are applicable to the common law action of ejectment are also applicable to the various actions and proceedings which have been created by statute to enable the landlord to regain the possession of the premises on the tenant's default. The acceptance of rent by the landlord after the rendition of a judgment in his favor in a possessory action is not a waiver of a forfeiture though the rent paid was due prior to the commencement of the action.⁷⁴ Where the landlord has had judgment awarded him in a possessory action from which the tenant has appealed and given a bond to stay execution upon condition that he pay the rent during his occupancy, the receipt of the rent by the landlord after the judg-

⁷¹ Doe d. Marecraft v. Meux, 1 Car. & P. 346, 7 D. & R. 98, 4 B. & C. 606, 4 L. J. (O. S.) K. B. 4, 28 R. R. 426; Jones v. Carter, 15 Mee. & Wel. 718; Grimwood v. Moss, 27 L. T. 268, L. R. 7 C. P. 360; Toleman v. Portbury, 24 L. T. 24, L. R. 6 Q. B. 245.

⁷² Grimwood v. Moss, 41 L. J. C. P. 239, L. R. 7 C. P. 360, 27 L. T. 268, 20 W. R. 972.

⁷³ Evans v. Wyatt, 43 L. T. 176, 44 J. P. 767, citing Marecroft v. Meux, 4 B. & C. 606, 7 D. & R. 98. It follows from the rule of the

text that the service by a lessor upon the lessee of a declaration in ejectment for a forfeiture operates as a final election by the lessor to terminate the lease and he cannot thereafter, though there has been no judgment in the ejectment, sue for rent subsequently accruing or on covenants broken after the declaration. Jones v. Carter, 15 M. & W. 718.

⁷⁴ Carter Publishing Co. v. Dennett, 11 S. D. 956, 78 N. W. Rep. 956.

ment is not of course a waiver of any rights to which the landlord may be entitled.⁷⁵ The same rule applies to the receipt of rent from a tenant who has appealed from a judgment of restitution when the rent is paid after the appeal has been decided against the tenant.⁷⁶ And where a tenant, after a possessory action has been decided against him, appeals and for any reason is granted a stay upon condition that he shall pay rent, the acceptance of the rent subsequently accruing is never a waiver of a forfeiture. In all such cases if the tenant remains in possession the court may apply the payments of rent to the debt due before the action was begun, as the acceptance of rent is purely a matter of favor in the absence of evidence that the tenant is paying for his present use and occupation of the premises.⁷⁷ Under such circumstances, the payment of the rent is made by reason of the undertaking given by the tenant or it is made by order of the court, and the lessor has no option except to take it or let it remain in court and if he does the latter it will remain as his property. So, the occupation by the tenant is not by the will of the landlord but it is against his consent. The occupation is not to be referred to the lease but to the situation created by the appeal and the undertaking given to stay the execution. Thus the payment and the receipt of rent pending the appeal are referable to the situation and not to the will of the landlord. The law does not and cannot intend the absurd conclusion that the landlord must forego all rents during the pendency of the appeal while the tenant is in possession under penalty of forfeiting all his rights in the action.⁷⁸ Inasmuch as the receipt of rent by the landlord is construed to be a waiver of a forfeiture because it evinces his intention that the tenant shall remain in possession and as the landlord cannot at the same time treat the lease as valid by receiving rent under it and invalid by ousting the tenant it follows that the waiver must always be the result of a choice by the landlord. If there is no choice or option to receive or to refuse the rent, there is no waiver by the landlord receiving the rent. It follows from those rules and principles that the

⁷⁵ *Palmer v. City Livery Co.*, 98 Wis. 33, 73 N. W. Rep. 559.

⁷⁶ *Hopkins v. Holland*, 84 Md. 84, 35 Atl. Rep. 11.

⁷⁷ *Chiera v. McDonald*, 121 Mich. 54, 79 N. W. Rep. 908.

⁷⁸ *Palmer v. The City Livery Co.*, 98 Wis. 33, 35, 73 N. W. Rep. 559.

institution of an action of ejectment or similar possessory action by the landlord should not alone prevent him from maintaining an action for rent subsequently accruing, or, at least for the reasonable value of the use and occupation, where a tenant is permitted to remain in the possession by the order of the court. In some states the matter is regulated by the local statutes which should invariably be consulted.

§ 405. A waiver may be implied from other facts than the acceptance of the rent. Any action on the part of the landlord in dealing with the property demised after a forfeiture has occurred from which it may fairly be implied that it is his intention to permit the relationship of landlord and tenant to continue will be considered by the courts, especially the court of equity, as a waiver. The landlord may waive his right of entry by making a new lease with the tenant with a full knowledge of the tenant's default.⁷⁹ So, too, if after a forfeiture has occurred and the landlord has begun an action to oust the tenant, he sues for the rent asserting in his pleading in the second action that the defendant is still his tenant, he waives the benefit of the forfeiture.⁸⁰ The silence of the landlord when the tenant offers to pay the rent which is past due by crediting it on a note payable by the landlord, and which was in the ownership and possession of the tenant is a waiver of the forfeiture. In this case the note was larger in amount than the rent and was not due. The failure of the landlord to object to this mode of paying the rent will estop him from subsequently asserting a forfeiture for the tenant had a right to infer, from the failure of the landlord to object, that his proposition was satisfactory to the landlord. The latter might have objected because the tender was not in cash, or because the note was not yet due, but he had no right to give the tenant the impression that he would receive the rent in this manner and then insist on a forfeiture.⁸¹ The circumstance that a lessor either by his silence or conduct leads or induces his lessee to believe that he will not hold the lessee to a prompt and strict performance of the covenant to pay the rent, will appeal to the conscience of the court of equity. He may

⁷⁹ Felton v. Strong, 37 Ill. App. 58.

⁸¹ Johnson v. Douglass, 73 Mo. 163, 171.

⁸⁰ Nagel v. League, 70 Mo. App. 487.

therefore with fairness be subsequently denied the right to enforce a forfeiture which is based on a breach of covenant which he has been himself instrumental in producing.⁸² In determining whether an election has been made between enforcing and waiving a forfeiture the cases hold that where there has been a forfeiture and there has been an election to enter or not, if the landlord either by word or by act determines that the lease shall continue in existence and he communicates that determination to the tenant, he has in fact elected that the tenant shall continue to be such and that the tenancy shall continue. And having elected he cannot retrace his steps.⁸³ What conduct by a landlord aside from the receipt of rent shall constitute a waiver of a forfeiture depends on the circumstances of each case. A notice to quit served on a specific breach of one covenant or condition is a waiver of every other breach of covenant or condition which has occurred prior to the service of the notice to quit.⁸⁴ So, also, an oral consent that the tenant shall make alterations is a waiver of a forfeiture incurred by making repairs and alterations without the written consent of the landlord.⁸⁵ And the consent of the lessor given to the assignment of a written lease is a waiver of a forfeiture which is based upon the assignor's breach of a covenant to use the premises for a particular purpose and in a particular manner.⁸⁶ So, as a general rule after knowledge has come to the landlord that a lease has been assigned by the tenant in breach of a covenant not to assign without his consent, if he shall conduct a correspondence with the assignee and treat him as his tenant, he will be regarded as having waived the forfeiture attached to the covenant not to assign without consent. Under such circumstances the failure of the landlord to object to the assignment in time and his silence until the lessee relying upon his silence has lost his rights under the lease, will thereafter estop the landlord to deny he has assented to the assignment or that he has waived his right to re-enter.⁸⁷ And as a general proposition, any act

⁸² *Thropp v. Field*, 26 N. J. Eq. 82, 84.

⁸³ *Ward v. Day*, 4 Best & Smith, 327; *Green's Case*, Cro. Eliz. 3.

⁸⁴ *Brooks v. Rodgers*, 99 Ala. 433, 12 So. Rep. 61.

⁸⁵ *Moses v. Loomis*, 156 Ill. 392, 40 N. E. Rep. 952.

⁸⁶ *Deaton v. Taylor*, 90 Va. 219, 17 S. E. Rep. 944.

⁸⁷ *Warner v. Cochrane*, 128 Fed. Rep. 553.

on the part of the landlord which will constitute a waiver of a forfeiture incurred by reason of the non-payment of rent will effect a waiver of a forfeiture caused for any other reason. In all such cases the fact that the lease under a clause of which the forfeiture was incurred is in writing and under seal is not material though the waiver is implied from the circumstances only. The waiver is based on an estoppel arising from the conduct or language of the landlord.⁸⁸

§ 406. **When the payment of subsequent rent does not waive a forfeiture.** Under particular circumstances the acceptance of subsequently accrued rent by the landlord after a forfeiture has been incurred may not be a waiver of the forfeiture. The parties may stipulate when the rent is received that its acceptance by the landlord shall be without prejudice to his right to declare a prior forfeiture. And the receipt of rent by the landlord accompanied by an express agreement that no breach of covenant or condition is waived thereby in no way affects the right of the landlord to enter for a prior forfeiture.⁸⁹ There must, however, be an express agreement between the parties to the lease that the subsequent payment of the rent shall not operate as a waiver of the forfeiture. When money is paid and received as rent a mere protest by the landlord that it is accepted conditionally and without prejudice to his right to insist upon a prior forfeiture cannot countervail the effect of such receipt of the rent by the landlord.⁹⁰ The tenant has an absolute right to say in making a payment to his landlord in what character he pays or offers to pay the money. If he states in making a payment that he is paying rent, the landlord must either refuse to accept the money absolutely or he must accept it in the character in which it is offered to him. His mere statement that he does not accept the money as rent will not deprive the money of the character which has been affixed to it by the tenant. Where, after several forfeitures had occurred and the lessee tendered rent which the lessor refused to take except on the terms that it should be taken not as rent but for use and occupation subsequent to the forfeiture to which condition the lessee

⁸⁸ *Moses v. Loomis*, 156 Ill. 392, 395, 40 N. E. Rep. 952.

⁸⁹ *Miller v. Prescott*, 163 Mass. 12, 13, 39 N. E. Rep. 409.

⁹⁰ *Davenport v. Reg.*, 47 L. J. P. C. 8, 3 App. Cases, 115, 37 L. T. 727; *Strong v. Stringer*, 61 L. T. 470.

refused to accede whereupon the lessor took the money declaring he would and did not take it as rent, the court held there was a waiver. For in law and under such circumstances the nature of the payment of money must be determined according to the intent of the person paying it and if the landlord accept the money no protest on his part can operate to prevent the legal effect of the payment of money as rent on the part of the lessee.⁹¹ On the other hand, the tenant cannot, by paying a part of the rent which was due, compel the landlord to waive a forfeiture by stating that the acceptance by the landlord of the sum which has been paid shall operate as a waiver of a forfeiture. The acceptance of the whole sum due as rent will be in law a waiver but this effect will not arise from partial payment without the consent of the landlord. But the declaration by the tenant that money is paid as rent must be unequivocal and must be brought to the personal knowledge of the landlord. The tenant in default for non-payment of the rent for several months cannot, by sending a check to his landlord for one month's rent, upon which words are noted in a very abbreviated form stating that the check is in payment of rent to the day of its date and of its mailing, procure a waiver of the forfeiture though the check is received and deposited by the agent of the landlord in the usual course of business.⁹²

§ 407. **Waiver by silence and delay.** Whether a landlord has or has not waived a forfeiture is purely a question of his intention. Usually his intention is to be inferred from his actions and where circumstances occur which entitle a landlord to take advantage of a forfeiture and he does acts which show he means to waive the forfeiture the landlord cannot take advantage of the forfeiture though his acts were illegal or were such as he was not entitled to do. Thus the levy of a distress may under some circumstances be a waiver of a forfeiture though the distress was illegal.⁹³ Generally where it is covenanted that the term shall become "null and void" at the option of the lessor on a breach of the condition, he must usually do some act

⁹¹ Croft v. Lumley, 5 El. & Bl. 648, 25 L. J. Q. B. 223, 2 Jur. (N. S.) 275, 4 W. R. 357.

⁹² Cochran v Philadelphia Mort-

gage & Trust Co. (Neb.), 96 N. W. Rep. 1051.

⁹³ Ward v. Day, 5 B. & S. 359, 33 L. J. Q. B. 254, 10 L. T. 578, 12 W. R. 829.

declaring or claiming the forfeiture.⁹⁴ Such a covenant means only that the lease is voidable at the option of the lessor and not that it is absolutely void. Mere delay to act or silent acquiescence upon the part of the landlord, even after he has knowledge of an act or failure to act on the part of the tenant which would give him the right to declare a forfeiture will hardly, taken alone, constitute a waiver of the right of the landlord to re-enter.⁹⁵ It is a question of fact. The extent of the delay which will operate as a forfeiture is a question for the chancellor to determine. In determining this a court of equity will consider the circumstances of each case. A delay of twenty-three days in declaring a lease forfeited for the non-payment of rent has been held not to be a waiver.⁹⁶ A long delay by the lessor in asserting his rights particularly if the rights of third persons have intervened may be sufficient in equity to constitute a waiver of a forfeiture.⁹⁷ Thus the delay of a lessor for five months after a failure on the part of the lessee to pay rent of a farm, without any intimation that he would enforce a forfeiture, the lessee cultivating the farm in the meantime according to his agreement under the lease may be shown to prove a waiver but this is not conclusive unless the tenant can show all the legal elements of an estoppel.⁹⁸ But delay to enforce a forfeiture in connection with conduct on his part suggestive of an intention by the landlord to waive the forfeiture may particularly where the rights of third parties have attached, constitute a waiver. If the conduct of the landlord towards the tenant in regard to the use which the latter makes of the premises or as regards any action which the tenant is bound to perform under the lease to prevent a forfeiture is of such a character as to induce a cautious and reasonable man to infer that the landlord is satisfied that the tenant is fulfilling his covenants and conditions, a forfeiture will be waived thereby.⁹⁹ Thus a mere standing by of the landlord and seeing a tenant making alterations which are in breach

⁹⁴ Walker v. Engler, 30 Mo. 130.

⁹⁵ Lindsey v. Lindsey, 45 Ind. 552, 567; Island Coal Co. v. Combs, 152 Ind. 379, 391, 53 N. E. Rep. 452; Jackson v. Chrysler, 1 John. Cas. (N. Y.) 125, 127; Cochran v. Philadelphia, etc., Co. (Neb. 1905), 96 N. W. Rep. 1051, 1053.

⁹⁶ Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. Rep. 476.

⁹⁷ Drake v. Lacoe, 157 Pa. St. 17, 27 Atl. Rep. 538.

⁹⁸ Morrison v. Smith, 90 Md. 76, 44 Atl. Rep. 1031.

⁹⁹ Doe d. Knight v. Rowe, 2 Car. & P. 246, R. & M. 343.

of his covenant is not a waiver.¹ But it has also been held that for the landlord to permit a tenant to remain in possession and to expend his money in building, after an eviction by the landlord for non-payment of rent, is a waiver of a forfeiture.² A landlord does not waive a forfeiture by a mere acquiescence in a continuing breach of a condition, as for example, in case of a breach of a covenant not to use the premises for a particular trade.³ A forfeiture arising from the tenant's failure to build houses on the land demised within a period which is specified in the lease is not waived by the landlord permitting the tenant to employ workmen to complete the houses for a short time after the forfeiture has occurred.⁴ A landlord who after a forfeiture comes to his knowledge advises a stranger to purchase the tenant's interest in the lease is estopped thereby to enforce a forfeiture caused by the tenant against the stranger after the latter has purchased the tenant's interest relying on the advice of the landlord.⁵ The rights of an innocent third party who has parted with value in reliance on the landlord's statements cannot be prejudiced by conduct or language of the lessor in such an unfair manner.⁶ Where a person has leased the use of water from a canal owned by the state, the failure of the lessor to collect rent or declare a forfeiture for non-payment of rent does not prevent the lessee from continuing the use of the water until he is evicted. Under such circumstances the state may by delay lose its right to enforce a forfeiture which has been created by a failure to pay rent particularly where the delay of the state to collect the rent has continued for very many years and property rights of third persons have attached to the use of the water because of a belief that the lessee's rights are unimpaired.⁷ An

¹ *Perry v. Davis*, 3 C. B. (N. S.) 769.

² *Hume v. Kent*, 1 Ball. & B. 554.

³ *Doe d. Sheppard v. Allen*, 3 Taunt. 78, 12 R. R. 579.

⁴ *Doe d. Kensington v. Brindley*, 12 Moore, 37, 5 L. J. (O. S.) C. P. 3.

⁵ *Doe d. Sore v. Eykins*, 1 Car. & P. 154, R. & M. 29.

⁶ "In some cases particular acts

may waive a forfeiture by affirming the continuance of an estate after a condition broken, but these are acts done by the grantor or lessor after a forfeiture accrued and for his benefit. No parol assent will amount to such a waiver." *Jackson v. Crysler*, 1 Johns. Ca. (N. Y.) 125, 127.

⁷ *People v. Freeman*, 110 App. Div. 605, 97 N. Y. S. 343.

entry by the landlord for a forfeiture by a breach of any specially designated condition is a waiver of his right to enter for a breach of any other condition of which he has knowledge when he enters.⁸

§ 408. **The waiver of a continuous breach of a condition.** The rule that the acceptance of rent by a landlord waives a forfeiture does not apply to rent which is accepted during a continuous breach of a covenant. The reason of this is that though the receipt of rent may be a waiver of a past forfeiture, it does not and cannot waive that which is in the future, and, where the breach of the covenant or the condition is continuous, new breaches are occurring daily, and on these the prior payment of rent will have no effect. Hence it is a general rule that the acceptance of rent accruing after a breach of condition where the condition was of a continuing nature waives a forfeiture only as to past breaches of such condition. It does not preclude the landlord from taking advantage of a forfeiture resulting from a subsequent breach of the same condition.⁹ Thus an action of ejectment may be supported in respect to a continuing breach of a covenant against the using of rooms for a prohibited purpose though the rent has been accepted with a knowledge of the original breach.¹⁰ In other words, the fact that a landlord receives rent with the knowledge that his tenant has begun to

* "An entry made for other breaches of condition and without knowledge of this breach cannot be regarded as an exercise by the lessor of the option to take advantage of this breach. The entry in this case was, upon the evidence, manifestly for breach of the condition requiring a continuous exhibition, while the order permitted. There was no evidence tending to show an exercise by the lessor of the option to take advantage of a breach of the condition against subletting. The lessor after entry, however, entered for other reasons, and should not be permitted to mend its hold by assigning other breaches which the ingenuity of counsel may be

able to point out, and upon which the lessor did not in fact exercise its option." *Boston El. R. Y. Co. v. Grace & Hyde*, 112 Fed. Rep. 279, p. 286.

⁹ *Gluck v. Elkan*, 36 Minn. 80, 81, 30 N. W. Rep. 446; *Block v. Ebner*, 54 Ind. 544; *Farwell v. Easton*, 63 Mo. 446; *Doe v. Gladwin*, 6 Q. B. 953, 51 E. C. L. 953; *Doe v. Woodbridge*, 9 Barn. & C. 376.

¹⁰ *Doe d. Ambler v. Woodbridge*, 4 M. & Ry. 376, 7 L. J. (O. S.) K. B. 263, 28 R. R. 426; *Doe d. Baker v. Jones*, 5 Ex. 498, 19 L. J. Ex. 405; *Doe d. Muston v. Gladwin*, 6 Q. B. 953, 14 L. J. Q. B. 189, 9 Jur. 508.

use the premises for a purpose prohibited by the lease and that he has continued to use them for that purpose down to the time the landlord receives the rent does not prevent the landlord from subsequently ousting him if subsequently he persists in the forbidden use. This doctrine, however, must be taken with some qualifications. In reference to a waiver by the landlord of a continuing breach there may be a distinction made between a case of something which is to be done by the tenant and which remains undone by him and the doing of which may with reason be postponed and a case of something which the tenant is forbidden to do by the lease and which he does and continues to do. A good example of this distinction may be seen in the case of a breach by the lessor of a covenant to repair on the one hand and the breach by the tenant of a covenant by him to use the premises for a particular purpose on the other. Of necessity there ought to be a distinction for the reason that otherwise the landlord may be afforded an almost unlimited opportunity to take advantage of his tenant. Thus, in the case of a covenant by the tenant not to use the premises for a particular purpose, the landlord might, with a full knowledge that the thing had been done which the tenant was forbidden to do and upon the doing of which a forfeiture was to accrue, continue to receive rent so long as it suited his purpose and then when it suited him to oust the tenant, turn him out at a period when the tenant's possession was most valuable to him. This course of action the landlord should not be permitted to follow upon his contention that this use of premises by the tenant works a continuing forfeiture of which the receipt of rent is not a waiver. The case of a forfeiture because of the tenant's failure to repair generally during the term, is on a different basis. No one can say at what exact moment repairs are necessary. The tenant must have a reasonable time to make them and ordinarily he may make them at any time during the term before a forfeiture is declared and thus preserve his term. Hence it is not at all unfair to call such a breach a continuous one and to permit a landlord to enforce it though he may have received rent during the time the premises were out of repair.¹¹ Whether a breach is or is not a continuous breach depends upon the nature

¹¹ Griffin v. Tomkins, 42 L. T. 359, 44 J. P. 457.

of the covenant and particularly upon the language used by the parties in framing it. Thus, to illustrate the breach of a covenant by the tenant to erect certain buildings within a fixed time is not a continuing breach and hence may be waived by the landlord subsequently receiving rent.¹² This is true also of a covenant "forthwith" to put the premises into good and tenantable repair.¹³ But where the tenant covenants that he will build certain houses on the property and also that he will keep the premises so to be erected at all times in good repair, it was held that the covenant to repair bound the tenant to erect the buildings within the period prescribed and that if he failed to do this the breach of the covenant would be a continuing breach.¹⁴

§ 409. **A forfeiture caused by a breach of a covenant to repair.** What conduct on the part of the landlord shall amount to a waiver of a breach of a covenant or condition to repair depends usually on the facts of each case and particularly on the language of the covenant to repair. A failure to repair under a general covenant to repair or to keep in repair which means during the whole term, is a continuing breach and the delay of the landlord in enforcing a forfeiture which is occasioned thereby or his making some repairs himself is not usually a waiver of a forfeiture for the covenant is continuously broken every day the premises are left in bad repair or condition by the ten-

¹² *Jacob v. Down*, 69 L. J. Ch. 493, (1900) 2 Ch. 156, 83 L. T. 191, 48 W. R. 441, 64 J. P. 552.

¹³ *Coward v. Gregory*, 15 L. T. Rep. 279, L. Rep. 2 C. P. 153.

¹⁴ *Jacob v. Down*, 69 L. J. Ch. 493; (1900) 2 Ch. 156, 83 L. T. 191, 48 W. R. 441, 64 J. P. 552. In *Doe d. Baker v. Jones*, 5 Exch. 498, on page 504, Alderson, B., says: "The receipt of rent is a waiver of all forfeitures, which are, so to speak, single and complete, and are not in the nature of continuing forfeitures. So with respect to continuing forfeiture, where the lessee is bound from time to time to keep the premises in repair, and he omits for an unreasonable time, but afterwards

repairs them, then the receipt of rent waives the previous forfeiture. But where the matter is plainly a continuing breach, the only question is whether when the party seeks to enter, the premises have been an unreasonable time out of repair and so continue." A landlord who has a right of re-entry on the breach of a covenant not to underlet, does not by waiving his re-entry on one underletting lose his right to re-enter on a subsequent underletting. Nor, by waiving his right to re-enter on a breach of a covenant to repair, does he waive his right to re-enter on subsequent want of repairs. *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

ant. Thus the action of the landlord allowing a tenant a little further time to repair after he is in default after a notice by his landlord to repair does not waive a forfeiture,¹⁵ which was created by the tenant's failure to repair on the notice given him by his landlord. But a landlord after extending his tenant's time to repair cannot subsequently disregard the extension he has given him and begin proceedings to procure the benefit of the forfeiture until the period of the extension has elapsed. Thus, a landlord who, finding the premises out of repair, gives his tenant three months' notice to repair cannot maintain an action of ejectment for a breach by the tenant of a covenant to repair on such notice until the three months' notice is up.¹⁶ And the giving of such a notice to repair is equivalent to a waiver of a forfeiture incurred by the tenant by his breach of a general covenant to repair without notice. A landlord cannot enforce a forfeiture and, at the same time, make the repairs and recover their value from the tenant. If he, when premises are permitted by the tenant to remain out of repair shall enter therein and make the repairs and then sue the tenant for the costs of the repairs he waives a forfeiture created by the lease on the failure of the tenant to keep in good repair.¹⁷ Generally a demand for rent while the premises are in bad repair does not waive a forfeiture based on their condition for the reason that a breach of a covenant to repair is a continuous breach of covenant. A forfeiture which has accrued under a covenant to repair is not waived by the landlord suing for rent after he has notified the tenant to repair which the tenant has declined to do.¹⁸ So, even the payment of the rent by the tenant during the period the premises are in a state of bad repair does not constitute a waiver by the landlord of his right to enforce a forfeiture. Where compensation can readily be made to a landlord whose tenant has forfeited his estate by a breach of his covenant to repair a Court of Equity will readily grant relief. In some cases relief will be granted where the tenant has

¹⁵ Doe d. Rankin v. Brindley, 1 N. & M. 1, 4 B. & Ad. 84, 2 L. J. K. B. 7.

¹⁶ Doe d. Morecraft v. Meux, 7 D. & R. 98, 4 B. & C. 606, 1 Car. & P. 346, 4 L. J. (O. S.) K. B. 4, 28 R. R. 426.

¹⁷ Doe d. Rutzen v. Lewis, 5 A. & E. 277, 289, 6 N. & M. 764, 2 H. & W. 162, 5 L. J. K. B. 217.

¹⁸ Penton v. Barnett, 67 L. J. Q. B. 11, 46 W. R. 33.

not been the victim of accident or mistake and where his omission to repair was entirely voluntary.¹⁹ This rule however is not without an exception and, in one case, the court refused to recognize even an accidental neglect to perform a covenant to repair, as an excuse.²⁰ A proviso for re-entry if a lessee "shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants," does not apply to a breach of a covenant to repair, the omission to repair not being an act done.²¹

§ 410. **The effect of a tender of rent.** The tender of the rent on the day when it is due at any time during the day down to sunset will prevent a forfeiture. The tender of the rent within a reasonable time after it is due will, in equity, if the rent is refused also prevent a forfeiture.²² A tender may be valid and effective even though it is made after an action to enforce a forfeiture has been begun. Even a court of common law may, and usually will stay proceedings begun and pending in it on the part of the landlord in such an action where the non-payment of rent was due to accident or mistake on the part of the tenant upon his paying into court the amount of the rent with interest and costs to the date of payment.²³ So a forfeiture may be avoided by the tenant tendering and paying into court the amount of the rent in an action to recover the rent and also the possession of the premises and the action for the possession will thereupon be dismissed.²⁴ But where a judgment of restitu-

¹⁹ *Hannam v. South London Waterworks Co.*, 2 Mer. 65; *Hill v. Barclay*, 16 Ves. 402, 18 Ves. 56, 11 R. R. 147; *Sanders v. Pope*, 12 Ves. 282; *Hack v. Leonard*, 9 Mod. 91. But see 19 Ves. 141.

²⁰ *Gregory v. Wilson*, 9 Hare, 683, 16 Jur. 304.

²¹ *Doe d. Abdy v. Stevens*, 3 B. & Ad. 299, 1 L. J. K. B. 101.

²² *Chapman v. Kirby*, 49 Ill. 211; *Burnes v. McCubbin*, 3 Kan. 221, 87 Am. Dec. 468; *Hodgkins v. Price*, 137 Mass. 13; *Tuttle v. Bean*, 13 Met. (Mass.) 275; *City of Carondelet v. Wolfert*, 39 Mo. 305; *Holmes v. Ginon*, 44 Mo. 164;

Lewis v. City of St. Louis, 69 Mo. 695, affirming 3 Mo. App. 582; *Jones v. Reed*, 15 N. H. 68; *Horton v. New York Central & H. R. R. Co.*, 12 Abb. N. C. (N. Y.) 30; *Planters' Ins. Co. v. Diggs*, 8 Baxt. (Tenn.) 563; *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435. See as to tender after notice to quit, *Dakota Hot Springs Co. v. Young*, 9 S. D. 577, 70 N. W. Rep. 842.

²³ *Atkins v. Chilson*, 11 Met. (Mass.) 2.

²⁴ *Nagel v. League*, 70 Mo. App. 490.

tion has been rendered in favor of the landlord the tenant cannot, by taking an appeal, making a tender of rent and paying the money into court while the appeal is pending escape the penalty of the judgment of restitution.²⁵

§ 411. **Relief against forfeiture at common law.** A court of law may in modern times at least as well as a court of equity relieve against a forfeiture which has been incurred by the tenant by the non-payment of the rent by him. Both in England and in the United States the common law courts have for a long period though to a limited extent recognized and admitted equitable defenses without turning the party over to a court of equity and at the present time their inclination and power to receive equitable defenses are unquestionably greater than they have ever been. But the courts of law will not usually apply or enforce equitable remedies though they may receive and consider equitable defenses. In the case of the forfeiture of a lease the court of law cannot enjoin the lessor from making an actual entry or from prosecuting ejectment or other action to oust the tenant or otherwise to enforce the forfeiture. What it cannot do directly however it may do indirectly. It may prevent a lessor from enforcing a forfeiture for the non-payment of rent by an ejectment by compelling him to receive the rent which is due him, on penalty of having his action dismissed when the tenant makes a proper tender. Thus in an action of ejectment for non-payment of rent a court of common law, on the payment into court by the lessee of the rent which is due with all costs and interest, will stay all proceedings and will require the plaintiff to accept the money paid in and permit the tenant to remain.²⁶ And a waiver of a forfeiture is a good defense both at law and in equity.²⁷

²⁵ *Walter Commission Co. v. Gil-
liland*, 98 Mo. App. 584, 73 S. W.
Rep. 295, 296.

²⁶ *Atkins v. Chilson*, 11 Met.
(Mass.) 112, 119; *Archer v. Snapp*,
Andr. 341.

²⁷ *Bridges v. Longman*, 24 Beav.
27, 30. "Forfeitures are not re-
garded by the courts with any
special favor. The party who in-
sists upon a forfeiture must make

clear proof of the circumstances
and show he is entitled to make
such a declaration. A forfeiture
is a harsh and usually an unfair
way of terminating a contract and
not infrequently works great
hardships. Hence, he who insists
upon making a declaration of a
forfeiture, cannot complain if he
is held to walk strictly within the
limits of the authority which gives

§ 412. **Equitable relief against forfeiture.** The common law rules regulating forfeitures are based largely upon the principles of the feudal system and, for this reason they very early came to be regarded as inapplicable to the social and commercial conditions of the times. Consequently it is said that the courts in modern times at least do not favor the creation or the enforcement of forfeitures in the case of leases or other instruments. If their enforcement is sought, particularly in a court of equity, the effect and operation of the covenant by which it is claimed a forfeiture has been created will be strictly limited. For forfeitures are not favored in equity.²⁸ Thus where a lessor by his acquiescence in his tenant's delay in paying the rent has induced his tenant to believe that a strict performance of his covenant to pay rent at the times specified in the lease will not be required of him, equity will not permit the landlord to enforce a forfeiture, where under the circumstances it would be inequitable, and full compensation can be made to the landlord for the consequences of the tenant's default²⁹ in paying rent. As a rule, which is supported by many authorities and is based upon sound principles of justice, where there has been a breach by a tenant of a covenant

the right." *Palmer v. Ford*, 70 Ill. 369, on page 377.

²⁸ *Randol v. Scott*, 110 Cal. 590, 42 Pac. Rep. 976, 977; *Wheeler v. Earle*, 5 Cush. (Mass.) 31, 34, 51 Am. Dec. 41; *Grummett v. Ginchgrass*, 77 Mich. 369, 43 N. W. Rep. 999; *Miller v. Havens*, 51 Mich. 482, 485, 16 N. W. Rep. 865; *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 415; *Burnes v. McCubbin*, 3 Kan. 221; *Phillips v. Tucker*, 3 Ind. 132, 135; *Marshall v. Vicksburg*, 82 U. S. 146, 149, 21 Law. ed. 121; *Doe v. Stevens*, 3 B. & Ad. 299; *Doe v. Hogg*, 4 Dowl. & R. 226; *Doe v. Godwin*, 4 M. & S. 265; *Doe v. Bond*, 5 B. & C. 855; *Horton v. New York Central & H. Riv. R. R. Co.*, 12 Abb. New Cases (N. Y.) 30; *Duffield v. Hue*, 129 Pa. St. 94, 18 Atl. Rep. 566; *White v. McMurray*, 2 Brewst. (Pa.) 485;

Gale v. Oil Run Petroleum Co., 6 W. Va. 200; *Hukill v. Myers*, 36 W. Va. 639, 647, 15 S. E. Rep. 151. "We are now in a court of equity. Courts of equity were originally founded, among other purposes, to relieve against the hardness of courts of common law, and notably to relieve against forfeiture, even when it clearly exists; and very safely it can be said that equity looks with disfavor upon forfeitures, and will not be quick, active or alert to see or declare or enforce them." *Hukill v. Myers*, 36 W. Va. 639, 645, 15 S. E. Rep. 151. Hence a court of equity will seize hold of circumstances such as the laches of the person endeavoring to enforce the forfeiture upon which to excuse the forfeiture.

²⁹ *Thropp v. Field*, 26 N. J. Eq. 82.

to pay rent equity will relieve against the forfeiture incurred thereby upon payment of the rent which is in arrears and interest, even though failure to pay the rent has been wilful upon the part of the lessee. Equity will grant relief against a forfeiture for the non-payment of the rent on the date it was due for compensation can readily be made to the lessor and be placed *in statu quo*.³⁰ The payment of interest by the lessee to the lessor on the rent from the date it was payable will be a sufficient compensation to the lessor for his damages as he will thereby be placed in the same position as if he has received his rent promptly. In equity general stipulations for re-entry by the landlord for the non-payment of the rent are considered as merely intended to secure the payment of the rent and not as designed to cause a forfeiture if the tenant acts in good faith and promptly pays the rent though after it is due when it is demanded or pays it at least before the landlord shall have suffered a loss or unreasonable inconvenience from the delay or default of the tenant.³¹ It does not seem to be material in the case of a default in the performance of a covenant to pay rent that the default was intentional. If a collateral covenant has been broken as, for example, to repair or to insure the premises; and the breach was the result of accident or mistake on the part of the lessee, or of fraud or surprise on the part of the lessor, and if the lessee can by a money compensation or otherwise put the lessor in the same position he would have been in case the breach had not occurred the forfeiture will be relieved against.³² But in all cases of the breach of covenants other than a covenant to pay rent no relief against forfeiture

³⁰ *Abrams v. Watson*, 59 Ala. 524; *Wilson v. Jones*, 1 Bush (Ky.) 173; *Atkins v. Chilson*, 11 Met. (Mass.) 112, 119; *Mactier v. Osborn*, 146 Mass. 399, 402, 15 N. E. Rep. 641, 644, 4 Am. St. Rep. 323; *Thropp v. Field*, 26 N. J. Eq. 82, 84; *Baxter v. Lansing*, 7 Paige Ch. (N. Y.) 350; *Garner v. Hannah*, 6 Duer (N. Y.) 262; *Planters' Ins. Co. v. Diggs*, 8 Baxt. (Tenn.) 563; *Hagan v. Buck*, 44 Vt. 285, 291, 8 Am. Rep. 368; *Donnelly v. Eastes*, 94 Wis. 390, 397, 69 N. W. Rep. 157; *Descarlett v. Dennett*, 9 Mod.

22; *Bowser v. Colby*, 1 Hare, 109, 11 L. J. Ch. 132, 5 Jur. 1106.

³¹ *Wilson v. Jones*, 1 Bush (Ky.) 173, 174.

³² *Mactier v. Osborn*, 146 Mass. 399, 402, 15 N. E. Rep. 641; *Atkins v. Chilson*, 11 Met. (Mass.) 112; *Carpenter v. Wilson*, 100 Md. 13, 59 Atl. Rep. 186; *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 415, 431; *Henry v. Tupper*, 29 Vt. 358; *Sanders v. Pope*, 12 Ves. 282; *Hukill v. Myers*, 36 W. Va. 639, 647, 15 S. E. Rep. 651. Relief from a forfeiture may be granted where

will usually be granted by a court of equity unless the covenantor can show that the breach by him was occasioned by his excusable accident or mistake or by surprise or by the fraud of the covenantee.³³ A court of equity in determining whether to grant a lessee relief against a forfeiture of the lease will carefully examine into all the circumstances of the case. If the court is asked to relieve a lessee against a forfeiture for non-payment of rent, the court will examine all the circumstances in order to ascertain if other covenants have been broken by the lessee. If other covenants have been broken and a forfeiture created thereby for which under the circumstances no relief can be had in equity, the court will not grant any relief as regards the breach of the covenant or condition to pay rent as this relief would be of no avail to the tenant in view of the other broken covenants.³⁴ So where the court is asked to relieve against a forfeiture of a lease to mine, because of the failure of the lessee to pay royalties, it will consider all the other particulars if any in which the lease has been broken by the lessee as, for example, his failure to furnish periodical statements of the quantity of ore mined, and his acts of waste, together with the fact that he is insolvent and therefore unable to pay the rent and the fact that the property is likely to be injured and destroyed by dissatisfied and dis-

the forfeiture arises from the non-payment of taxes by a tenant. *Webb v. King*, 21 App. D. C. 141.

³³ *Peachey v. Somerset*, 1 Stra. 447; *Hill v. Barclay*, 18 Ves. 56, 63; *Bracebridge v. Bulkley*, 2 Price, 200; *Elliott v. Turner*, 13 Sim. 477, 483, 485; *Eaton v. Lyon*, 3 Ves. 690, 692, 693; *Gregory v. Wilson*, 9 Hare, 683; *Descarlet v. Dennett*, 9 Mod. 22; *Rolfe v. Harris*, 2 Price, 206, n.; *Reynolds v. Pitts*, 19 Ves. 134; *White v. Warner*, 2 Mer. 459; *Green v. Bridges*, 4 Sim. 96; *Thompson v. Guyon*, 5 Sim. 65; *Nokes v. Gibbon*, 3 Drew. 681. In a case where there was alleged a breach by a tenant of his covenant to keep the premises insured, the court said: "By

accident or by mistake of the insurance-brokers, they (the insurance policies) were renewed in a form which does not fairly meet the requirements of the covenant. This was not wilful or voluntary on the part of the tenant. It was not an accidental forgetfulness to renew the policies. The property had been all the time insured. It was an occurrence not anticipated by the tenant and not known to her until the demandant claimed to enforce a forfeiture. The lessors have not been injured by the accident and can now be put *in statu quo*." *Mactier v. Osborn*, 146 Mass. 399, 402, 15 N. E. Rep. 641.

³⁴ *Nokes v. Gibbon*, 3 Drew. 693; *Bowser v. Colby*, 1 Hare, 109.

affected workmen.³⁵ The court will consider the conduct of the lessee who asks to be relieved from a forfeiture of a covenant other than that to pay rent. The conduct of the lessee must be considered in order to ascertain if his breach of the covenant was intentional or was inadvertent. And where relief is demanded from a forfeiture which is based upon the failure of the lessee for a few months to prosecute the work of fitting up the premises for occupation, the court will take into consideration the fact that during the period of the delay the lessee was preparing to have the work done, that he was in fact ready to proceed at the date the lessors entered, that the lessor had neither made a demand for greater haste, nor any complaint to the lessee of the delay; also that the delay was not wilful or in bad faith and that no injury had resulted to the lessor by reason of the delay.³⁶ A statute creating a forfeiture in the case of its violation by a lessee will be strictly construed in his favor. If a statute provides that a lessee of public lands from the state for a particular use and purpose shall forfeit his lease if he shall divert the land demised to him from such use and purpose does not require a forfeiture by the use of a portion of the land for another pur-

³⁵ Sunday Lake Mining Co. v. Wakefield, 72 Wis. 204, 39 N. W. Rep. 136.

³⁶ Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. Rep. 933. "As a proposition pervading this doctrine of the right of re-entry by the forfeiture of a lease of land, it is to be observed that the power to be exercised is a very strong power, and it is one which is exercised without the judgment of a court of justice or of any body else but the party who exercises it. The party determines for himself whether he has the right of re-entry, without any resort to a court of justice. This is always a harsh power. It has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised. Hence, it is that the old

common law provided in this class of contracts that it was the duty of the court to see that no injustice was done. It is reasonable, it is natural, that when a contract puts it into the power of one man to say that under certain contingencies, of which he is to be the judge, he shall enter upon the house or home or property of another, and eject him instantly, and take possession, it is reasonable, it is proper, that the contract and the acts which justify such a course of conduct shall be construed rigidly against the exercise of the right. A court of equity, when necessary, when this power has been exercised, will come in and afford relief." By Miller, J., in Kansas City Elevator Co. v. Union Pac. Ry. Co., 17 Fed. Rep. 200, on page 201.

pose which in no way interferes with but rather is auxiliary to the use of the premises for the purpose for which it was leased.³⁷ Equity will not relieve against the forgetfulness of the lessee in executing an underlease without the consent in writing of his landlord which was required under the terms of the lease, even though no damage has been sustained by the landlord and the under tenant was a respectable and responsible person. Forgetfulness on the part of the lessee or his agent by reason of which the procuring of the necessary consent is entirely omitted is neither accident nor mistake which will give the court of equity jurisdiction.³⁸ Though a court of equity is generally unwilling to enforce a forfeiture, it may do so under certain circumstances where the enforcement of a forfeiture asked as an affirmative relief is more consistent with right and justice, than to refuse it. A forfeiture will usually be enforced unless there are some elements of accident or mistake appearing in the proofs, and the party against whom it is to be enforced can be compelled to pay

³⁷ Equity will grant relief against a forfeiture for the non-payment of the rent, even after a judgment against the tenant in forcible detainer (*Abrams v. Watson*, 59 Ala. 524), and after the landlord has entered and received an attornment from the sub-tenants (*Wilson v. Jones*, 1 Bush (Ky.) 173), and also where the property is situated in another state so that the court cannot restore possession to the lessor. *Sunday Lake Mining Co. v. Wakefield*, 72 Wis. 204, 39 N. W. Rep. 136.

³⁸ *Barrow v. Isaacs*, 60 L. J. Q. B. 179, (1891) 1 Q. B. 417, 64 L. T. 686, 39 W. R. 338, 55 J. P. 517. "Nevertheless, it is obvious that there has been a breach of the covenant. Upon the breach the right of re-entry vested. At law, therefore, the plaintiff has the right to re-enter; that is to say he has the right to get rid of a long lease of great advantage to

the lessees. I do not know what his motives are for insisting on his right, but he does insist. There must, of course, be some motive for his doing so. He has, however, the legal right, and the question, therefore, is whether where it is clear that there is no real ground for objecting to the subdemise, and that the omission to ask the lessor's consent has had no effect at all and done no harm at all, equity will relieve against a forfeiture incurred, though subletting without such consent. Under which of the grounds that courts of equity have recognized can the relief that is sought in this case be brought? Equity will relieve against fraud, against accident and against mistake; and I think you must add that equity will only relieve where there can be complete compensation, or where there has been nothing for which compensation can be required. In the present

compensation.³⁹ The lessee may have relief from the consequences of a forfeiture caused by the negligence of his agent as well as by his own negligence.⁴⁰

case, there has clearly not been any fraud, nor can it be said that there has been any accident. Can this case be brought under the head of mistake? After looking through all the cases I cannot find any definition of what mistake is. Is mere forgetfulness mistake? Using the word mistake in its ordinary meaning in the English language I think that forgetfulness is not mistake. Forgetfulness is not the thinking that one thing is in existence when in fact something else is. It is the absence of thought as to the thing—the mental state in which the par-

ticular thing has passed out of the mind altogether. On that ground I should come to the conclusion very unwillingly myself, that this case was not one of those in which a court of equity could grant relief." *Barrow v. Isaacs*, 60 L. J. Q. B. 179, (1891) 1 Q. B. 417, 64 L. T. 686, 39 W. R. 338, 55 J. P. 517.

³⁹ *Brewster v. Lanyon Zinc Co.*, 72 C. C. App. 213, 140 Fed. Rep. 801.

⁴⁰ *Barrow v. Isaacs*, 60 L. J. Q. B. 179, (1891) 1 Q. B. 417, 64 L. T. 686, 39 W. R. 338, 55 J. P. 517.

